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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 822.

J. W. TODD, ALLEN LIGHTS, GEORGE SIMMS, ET AL.,
PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

FILED OCTOBER 13, 1894.

(15,706.)

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INDEX.

	Original.	Print.
Indictment	1	1
Demurrer to indictment	3	2
Order overruling demurrer	4	2
Order withdrawing plea of not guilty of Marion Copeland	5	3
Order entering plea of guilty of Marion Copeland	5	3
Order remanding Marion Copeland to custody of marshal	5	3
Order entering *nolle prosequi* as to certain defendants	6	3
Trial and verdict	7	4
Order continuing cause as to Marion Copeland	8	4
Motion in arrest of judgment	9	5
Order overruling motion in arrest of judgment	11	6
Judgment and sentence	11	6
Bill of exceptions	12	7
Statement of proceedings in selecting jury	12	7
Statement of evidence for United States	14	8

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	Original.	Print.
Statement of evidence for defendants	17	10
Statement of evidence for United States	18	10
Charge and exceptions	33	21
Defendants' requests to charge	35	22
Motion in arrest of judgment	41	25
Judge's certificate to bill of exceptions	43	26
Petition for writ of error	44	27
Assignment of errors	47	29
Writ of error	73	44
Clerk's certificate	74	45

1 *Indictment.*

In the District Court of the United States for the Southern Division of the Northern District of Alabama, March Term, A. D. 1893.

The grand jurors of the United States, elected, empannelled, sworn, and charged to enquire for the body of the said southern division of the northern district of Alabama, upon their oaths present:

That heretofore, to wit, on the fourth day of March, in the year of our Lord eighteen hundred and ninety-three, in the county of Cherokee, in said division of said district, and within the jurisdiction of said district court, J. W. Todd, alias Watson Todd; George W. Kelley, Henry Roberts, Will Sims, John Sims, George Sims, Will Hooper, James Ghee, Samuel Sims, James B. Bishop, Mike Beck, Jack Beck, Mark Beck, Marion Ray, Taylor Brock, Jim Latham, A. D. Wilson, Will Mitchell, Marion Copeland, Jerome Copeland, Wils Brooks, Will Manley, Manly Copeland, Milton Farmer, Allen Lights and Henry Stipson and Nute Hale, whose Christian names and surnames respectively — to this grand jury otherwise unknown, unlawfully, corruptly, forcibly, and feloniously did combine, conspire, and confederate together, by force and intimidation and threats, to injure Wiley P-uett and William Pruett, who had theretofore been witnesses and testified against Joe Arnold, Milton Farmer, and George Kelley upon a charge of endeavoring to influence, intimidate, and impede witnesses in a court of the United States, in violation of the criminal laws of the United States, tried preliminarily by and before Robert Charlson, acting as a commissioner of the circuit court of the United States for said district, in their person and property, on account of the said witnesses above named having testified in said cause in the said court as aforesaid, and in pursuance of said conspiracy and to effect the object thereof the said defendants and each of them did assault, beat, bruise, and wound with weapons the said Wiley Pruett and William Pruett, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States

2 LEWIS E. PARSONS, JR.,
United States Attorney.

Endorsed: Filed in open court this 18th day of March, 1893. N. W. Trimble, clerk.

Verdict endorsed:

We, the jury, find the defendants J. W. Todd, Henry Roberts, Will Sims, John Sims, George Sims, Will Hooper, Jack Beck, Mark Beck, Will Mitchell, Marion Ray, Allen Lights, Samuel Sims, and Henry Stimpson guilty as charged in the indictment.

A. M. PRUDE, *Foreman.*

3 *Demurrer to Indictment.*

UNITED STATES
vs.
J. W. TODD *et als.*

Indictment in southern division of the northern district of Alabama.

Come now the defendants, and for answer to the indictment in this cause demur thereto and for grounds of demurrer assign the following:

1st. Said indictment is inconsistent and self-repugnant, in that it sets out the Christian and surnames of the defendants and yet in the same count avers their Christian names and surnames are to the grand jury unknown.

2nd. Said indictment is inconsistent and self-repugnant, in that it sets out the Christian names of defendants and yet in the same count avers that their Christian names are to the grand jury unknown.

3rd. Said indictment is inconsistent and self-repugnant, in that it sets out the surnames of defendants and yet in the same count avers that their surnames are to the grand jury unknown.

4th. Said indictment charges no offense against the laws of the United States.

5th. The indictment does not charge this offense in the language of the statute creating the offense nor in words of similar import.

Wherefore, for said imperfections and defects in said indictment, defendants pray the judgment of the court whether the same is not insufficient in law and whethet they ought to be held further to answer the same.

(S'g'd) DENSON, BILBRO & BURNETT,
Att'ys for Def'ts.

Endorsed: Filed March 21, '93. N. W. Trimble, clerk.

4 *Order Overruling Demurrer.*

THURSDAY, *July 6th, A. D.* 1893.

Court met pursuant to adjournment.

Present: The Hon. John Bruce, district judge, presiding; Hon. Emmet O'Neal, U. S. district attorney; J. C. Musgrove, U. S. marshal, and N. W. Trimble, clerk.

UNITED STATES
vs.
J. W. TODD & *al.* } 119. Sec. 5406.

This cause coming on to be heard upon the demurrers of the defendant- to the indictment filed against then, and after being argued by

counsel *pro* and *con.* and duly considered by the court, it is ordered that the said demurrer be, and the same is hereby, overruled.

The defendants, by their counsel, thereupon excepted to said ruling.

5 *Orders of Court.*

MONDAY, *July 10th, A. D.* —.

Court met pursuant to adjournment.

Present: The Honorable John Bruce, district judge, presiding; Emmet O'Neal, district attorney; J. C. Musgrove, U. S. marshal, and N. W. Trimble, clerk.

UNITED STATES
vs.
J. W. TODD *et al.* } Sec. 5406.

Come the parties, by their attorneys, and also comes defendant Marion Copeland in his own proper person, who, after leave of the court first had and obtained, withdraws his plea of not guilty, heretofore interposed by him on a former day of this term in this cause.

UNITED STATES
vs.
J. W. TODD *et al.* } Sec. 5406.

Comes the United States, by its attorneys, and also comes the defendant Marion Copeland and, by leave of the court, interposes a plea of guilty to the indictment filed in this cause.

UNITED STATES
vs.
J. W. TODD *et al.* } Sec. 5406.

The defendant Marion Copeland having plead guilty to the indictment filed herein, it is ordered by the court that he be remanded to the custody of the marshal to await the judgment of the court to be passed upon him.

6 *Nolle Pros. as to Certain Def'ts.*

UNITED STATES
vs.
J. W. TODD *et als.* } Sec. 5406 R. S.

Comes the United States, by its attorney, Emmet O'Neal, and special assistant U. S. attorney, Frank S. White, and, by leave of the court, enters a *nolle prosequi* in this cause as to the following-named defendants, to wit, Nute Hale, James McGhee, Taylor Brock, A. D. Wilson, James B. Bishop, Jerome Copeland, J. W. Latham, Wils Brooks, Manly Copeland, Will Manly, and Mike Beck.

Thereupon said defendants, by their attorneys, objected to the

entry of said *nol. pros.* and demanded the entry of a jury trial and verdict of not guilty; which objection and demand being overruled and refused, the said defendants, by their attorneys, duly excepted thereto.

7 *Plea and Verdict.*

THURSDAY MORNING, *July 27th, A. D.* 1893.

Court met pursuant to adjournment.

Present: Hon. John Bruce, judge, presiding; Emmet O'Neal, U. S. attorney; J. C. Musgrove, marshal, and N. W. Trimble, clerk.

THE UNITED STATES *vs.* J. W. TODD *et als.* } 119. Indictment for Violation Section 5406 R. S. U. S.

Comes the United States, by Emmet O'Neal, Esq., U. S. attorney, and by special assistant U. S. attorney, Frank S. White, Esq., and also comes the following-named defendants, to wit, J. W. Todd, Henry Roberts, Will Sims, John Sims, George Sims, Will Hooper, Jack Beck, Mark Beck, Will Mitchell, Marion Ray, Allen Lights, Samuel Sims, and Henry Stimpson in their own proper persons and by counsel, and each having been duly arraigned upon the indictment filed herein against them, and after having heard the same read, each for himself plead not guilty. Thereupon, to try the issues joined, comes a jury of good and lawful men, to wit, A. M. Prude and eleven others, who, being duly elected, tried, and sworn, upon their oaths do say:

"We, the jury, find the defendants J. W. Todd, Henry Roberts, Will Sims, John Sims, George Sims, Will Hooper, Jack Beck, Mark Beck, Will Mitchell, Marion Ray, Allen Lights, Samuel Sims, and Henry Stimpson guilty as charged in the indictment.

A. M. PRUDE, *Foreman.*"

8 *Order.*

SATURDAY, *July 29th, A. D.* 1893.

Court met pursuant to adjournment.

Present: The Honorable John Bruce, district judge, presiding; Emmet O'Neal, U. S. attorney; J. C. Musgrove, U. S. marshal, and N. W. Trimble, clerk.

UNITED STATES *vs.* J. W. TODD & *als.* } 119. Sec. 5406.

The defendant Marion Copeland having plead guilty to the indictment herein on a former day of this term, it is ordered that said cause be continued for sentence, so far as said Marion Copeland is concerned.

9 *Motion in Arrest of Judgment.*

In the District Court of the United States for the Southern Division of the Northern District of Alabama.

THE UNITED STATES OF AMERICA
vs.
J. W. TODD, HENRY ROBERTS, WILL SIMS, GEORGE SIMS, JOHN Sims, Will Hooper, Samuel Sims, Jack Beck, Mark Beck, Marion Ray, Will Mitchell, Allen Lights, Henry Stimpson, Defendants.

Now comes the defendants in their own proper person and by counsel, viz., Denson & Burnett, W. H. Smith, and Bulger and Altman, and moves the court to arrest the judgment and for a new trial in this cause for the following reasons:

First. The indictment is not sufficient in law to have put the defendants on trial, the defects in which are so patent that they are not cured by the verdict of the jury in this case; which defects are:

First. The indictment does not charge specifically and clearly the purpose of the conspiracy attempted to be charged in the indictment.

2nd. It does not charge specifically and clearly that Wiley and William Pruitt, the parties alleged to have been assaulted and beaten, had ever at any time or place been witnesses in any court of the United States of America.

3rd. It is not alleged the defendants knew when the assaulting and beating is alleged to have taken place that Wiley Pruitt and William Pruitt had been witnesses in any court of the United States of America.

4th. It is not alleged that when the alleged conspiracy was formed or entered into it was so formed and entered into for the purpose of by force or threats or by assaulting, beating, bruising, and wounding with weapons the said Wiley and William Pruitt to intimidate or injure said Pruitts the alleged conspiracy was so formed or entered into because they had been witnesses in any court of said United States.

5th. Said indictment does not allege that the defendants conspired together for the purpose of by force, threats, or intimidation to injure Wiley and William Pruitt because they, the said Pruitts, had attended and fully, freely, and truthfully testified in any court of the United States of America.

The defendants also move in arrest of judgment and for a new trial in this cause because the jury that tried this cause was allowed by the court on its own motion and, without the consent of the defendants, to disperse at each recess of the court and night during each day of the trial and mingle with the people and were not kept

together at any recess of the court until after the arguments were concluded.

(S'g'd) DENSON & BURNETT,
W. H. SMITH,
BULGER & ALTMAN,
Att'ys for Def'ts.

Endorsed: Filed July 28, 1893. N. W. Trimble, clerk.

11 *Order Denying Motion in Arrest of Judg't.*

UNITED STATES
vs.
J. W. alias WATSON TODD *et als.* } 119. Sec. 5406.

This cause coming on to be heard upon the motion of arrest of judgment filed and entered herein by and for the following-named defendants, to wit, J. W. alias Watson Todd, Henry Roberts, Will Sims, John Sims, George Sims, Will Hooper, Samuel Sims, Jack Beck, Mark Beck, Marion Ray, Will Mitchell, Allen Lights, and Henry Stimpson, and after being argued by counsel and duly considered by the court, it is ordered that said motion be, and the same is hereby, denied; thereupon said defendants above named, by their attorneys, duly excepted to the ruling of the court.

Sentence.

UNITED STATES
vs.
J. W. alias WATSON TODD & *als.* } 119. Sec. 5406.

The defendants, J. W. alias Watson Todd, Henry Roberts, Will Sims, John Sims, George Sims, Will Hooper, Samuel Sims, Jack Beck, Mark Beck, Marion Ray, Will Mitchell, Allen Lights, and Henry Stimpson, having been convicted on a former day of this term upon the indictment filed herein against them, the court, upon motion of U. S. district attorney, now proceeds to pronounce its judgment upon them.

It is therefore ordered by the court that the said defendants above named and each of them be imprisoned at hard labor in the Minnesota State prison, at Stillwater, in the State of Minnesota, for the term of four years and pay a fine of five hundred dollars and the costs of this prosecution.

12 *Bill of Exceptions.*

In the District Court of the United States for the Southern Division of the Northern District of Alabama, Sitting at Birmingham, Alabama.

THE UNITED STATES
vs.
J. W. TODD *et als.*

Be it remembered that on the fifth day of July, 1893, the above-stated cause coming on to be heard in said court at an adjourned term thereof, the following proceedings were had:

The indictment being read, a demurrer to same was overruled and the defendants duly excepted; the defendants each then plead "not guilty." Counsel for defendants, on behalf of each defendant separately, moved for a severance and a separate trial as to each defendant. The court overruled the motion, and the defendants severally and separately then and there reserved an exception to overruling of said motion. Jury No. one of said court was duly called to the box, said jury consisting of twelve men. Counsel for the Government asked leave and obtained leave of the court to ask the juror Douglas some questions to determine his fitness and with a view of challenging him for cause as a juror. In answer to such questions said juror stated that he had been to the jail two or three times, talking to one Welborn, a United States prisoner; that he had not been drinking liquor with any of the defendants that he knew of, but admitted that he had been drinking in different saloons in the city with the witnesses for the defendants during the afternoon. One Hulgin, being called as a witness to be examined with reference to the conduct and fitness of said Douglas as a juror, in answer to questions said that he had seen the juror Douglas standing in a saloon with the defendant Brock, but did not see them drinking together. One Reed, being called as a witness for the same
13 purpose, testified that he saw Douglas in a saloon with the defendant Brock, and was pretty certain he took a drink in the Burnet saloon that morning with said defendant; that he had seen the juror Douglas associating with the defendants that morning, and that he saw him drinking with other defendants, but was not positive about it; that he saw the defendants and the said Douglas smoking together, and saw Douglas walking up the street with some of the defendants, and saw him in conference and consultation with some of the defendants and their witnesses. Douglas, the juror, in answer to a question propounded to him by the court, said that he did not know any of the defendants.

This was in substance all the testimony in reference to this juror.

Counsel for the Government challenged the juror Douglas for cause; whereupon the court sustained said challenge, and to this action of the court the defendants severally and separately excepted.

Counsel for the Government having made their challenge to the jury, the same was completed and the defendants required to pass

upon the jury; whereupon the defendants challenged one juror and demanded that the panel should be completed again before they were required to challenge further, and moved the court that the panel be then completed before they were required to make further challenges. The court overruled this motion and required the defendants to make objections which they had to jurors then on the panel before completing the same. To this action of the court the defendants duly excepted.

Counsel for the defendants moved the court that the defendants be allowed more than three peremptory challenges to jurors. The court overruled the motion, holding that only three peremptory challenges be allowed to all of the defendants. To this action of the court the defendants then and there severally and separately duly excepted.

After having challenged three jurors, which challenges were sustained, the defendants offered to challenge Juror Jones; and, counsel for the Government consenting thereto, said juror was
14 excused from the panel. The defendants then jointly and also severally and separately offered to challenge Juror McCullough peremptorily; to which counsel for the Government objected, and the court sustained the objection on the grounds defendants were only entitled to three peremptory challenges and had exhausted the same; to which action of the court the defendants then and there jointly and severally and separately duly excepted.

The evidence of the part of the Government tendered to show that William Pruitt and Wylie Pruitt had, previous to the 4th March, 1893, been witnesses duly and legally subpœnaed in behalf of the United States, before Circuit Court Commissioner Robert Charlson, who was then and there United States circuit court commissioner for the northern district of Alabama, in a certain case then pending before said commissioner, wherein The United States was plaintiff and Joe Arnold, George Kelly, and Milton Farmer were defendants, which said charge was against said Joe Arnold, George Kelly, and Milton Farmer for endeavoring to influence, intimidate, and impede witnesses in a court of the United States, in violation of the criminal law of the United States, trial preliminary by and before Robert Charlson, acting as a commissioner of the circuit court of the United States for the northern district of the States of Alabama; that said Wiley Pruitt and William Pruitt had attened said trial and testified therein in behalf of the United States against said Kelly, Arnold, and Farmer. The testimony for the Government further tended to show that on the fourth of March 1893, in Cherokee county, in the southern division of the northern district of Alabama, between the hours of twelve and one o'clock at night, a crowd of armed men wearing masks came to the house where Wiley Pruitt was staying at the time, broke open the doors of the house, violently cursing and swearing and making threats of violence against Wiley Pruitt, dragging him from the bed where he was asleep and arousing other members of the family, all of whom were asleep; that they took the said Wiley

Pruitt out of the house by force, in his night clothes,
15 bareheaded and barefooted, carried him into the road in front of the house, and after keeping him there some time had his pants brought to him and was allowed to put them on; that he was then forced by this crowd of men to go with bare head and bare feet a distance of about half a mile, over the frozen ground and rocks, the night being very cold, to the house of William Pruitt; that while a portion of the men guarded Wylie Pruitt another portion of them surrounded the house of William Pruitt, broke the doors thereof down, aroused William Pruitt and his family, who were asleep, dragged William Pruitt from the bed and took him out to where Wylie was, and then required them to walk some distance in their night clothes, William Pruitt having on nothing but his night clothes and being bareheaded and barefooted. Wylie Pruitt was then required to take off his pants, and they were whipped by this mob with large sticks, some of which were one-half an inch in diameter and five or six feet long, until they were bloody from their shoulders to their knees, their backs being lacerated in many places, the skin on their backs being cut in gashes six to eight inches long. After being whipped in this way, having received about seventy-five strokes apiece, by men standing over and then whipping them with all the force that they could bring to bear, with both hands hold of the switches, they were required to walk back, bareheaded and barefooted, in their night clothes, the crowd firing off their pistols near their bare feet, so as to shoot so close to their feet that the gravel and rocks knocked out of place by their bullets *was* made to strike their feet so as to make them jump from place to place on the frozen ground and on the sharp rocks with which the road was covered. They returned William Pruitt to his house and then carried Wiley back to where they had found him.

The testimony of both Wylie and William Pruitt tended to show that these defendants were the persons guilty of taking William
16 and Wylie Pruitt from their homes and whipping them as aforestated. The testimony also tended to show that while they were being whipped these defendants told them that they were being whipped because they had been been witnesses for the United States in the case above stated before Circuit Court Commissioner Charlson, wherein The United States was plaintiff and said Arnold, Kelly, and Farmer were defendants; testimony also tended to show that Wylie and William Pruitt were warned by these men while they were being whipped that they must leave the country within two days thereafter. A number of these defendants were also identified by William Pruitt's wife and by Wesley Pruitt, a brother of William and Wylie, who came to the house where Wiley Pruitt was staying about the time they were bringing Wylie back there, and who also followed some of these defendants to their homes that night, it being a bright moonlight night. The testimony of these witnesses also tended to show that the defendants had *trans*pired and confederated together to whip and injure the said Wiley and William Pruitt and had whipped and injured them, as before stated,

because they had been witnesses and had attended and testified in said commissioner's court in the case of the United States against said Arnold, Kelly, and Farmer on the charge above mentioned. The testimony offered by the Government tended to show that the defendants and each of them were guilty as charged in the indictment in this cause.

The testimony of William Pruitt, Sr., the father of Wiley and William, also tended to show that a number of these defendants were the ones who inflicted this punishment upon Wiley and William, they having taken the said Wiley Pruitt from the house of the said William Pruitt, Sr., where the said Wiley was at the time he was taken from there, and the said William, Sr., also being present when they returned to his house with Wiley after the whipping.

17 The testimony of one Marion Copeland, a witness for the United States, who was jointly indicted with these defendants and who had plead guilty to the charge before being introduced, showed that all of the defendants were guilty of taking the said Wiley and William from their houses and whipping them on the occasion aforesaid, the said Marion Copeland being with them at the time. The said Marion Copeland*d*'s testimony showed that they, the defendants, had first notified him to go with them and, after he had declined, threatened him with like punishment unless he went on and helped them do the whipping. His testimony further showed that the defendants met, on the night of the whipping, at an old outhouse on the mountain side and there organized and determined upon the plan by which the Pruitts were to be whipped, and then went and put the same into execution. The said Marion Copeland's testimony also showed that each one of the defendants and a number of other persons who were with them, some of whom had not been arrested and were fleeing from justice, and others who had not been indicted, amounting to twenty in number, were each required to strike the Pruitts three licks with the switches, and two of the defendants, namely Todd and Hooper, struck them six licks each.

The testimony of the defendants tended to show that William and Wiley Pruitt were men of bad character, and that they had been guilty of some offenses in the neighborhood, such as killing stock, all of which, however, was said to have occurred many years ago, and also that they had made some threats against defendant Todd a short while prior to the whipping above mentioned. Marion Copeland testified on cross-examination that defendants said they whipped said Pruitts on account of their *th*eivishness, meanness, and cutting people's stock, and that he was present at the whipping and at the place of meeting and never did hear any of them say that they were whipping them for testifying in the Arnold, Kelly, and Farmer case.

18 The testimony of the defendants also tended to show that Wiley and William Pruitt were not worthy of belief, and the testimony of the defendants further tended to show that they were not guilty of the whipping of the Pruitts, as above mentioned, and

that if they were it was for other misbehavior in this neighborhood, in the way of killing stock and making threats, as above mentioned; and the tendency of the defendants' evidence was to prove an alibi.

And the testimony of one Odom, for defendants, tended to show that at a public gathering at a school-house in the neighborhood Christmas night, before the whipping was alleged to have occurred, Wm. Pruitt had threatened to dynamite the school-house, and if Todd was not killed by the dynamite he would shoot him as he ran out. Said witness was contradicted by other witnesses and by his own statement.

The testimony of the Government in reply to this testimony with reference to character tended to show that William and Wiley Pruitt were men of good character, and that they had not been guilty of killing stock, as charged by the testimony of the defendants, and that they had not made the threats against Todd, as shown by the testimony of the defendants, and that they were men of good character and worthy of belief.

The Government introduced Jerome Copeland as a witness, whose evidence tended to show that Will Hooper, one of defendants, asked him to go with them to whip the Pruitts, saying they had become so mean they could not — put up with any longer. This was on evening of the whipping and before it occurred. Marion Copeland's wife was also examined as a witness and testified on cross-examination that Will Mitchell and Marion Copeland, two of the defendants, told her on the night of the whipping that they were going to whip the Pruitts for their mean-ess.

In the examination of the witnesses the following occurred:

19 The witness William Pruitt, Sr., stated that he recognized the defendant Hooper by his face, by his voice, and by his swearing. Counsel for the Government asked the said witness the following question:

Q. Do you know whether he, Hooper, is in the habit of swearing?

The defendants objected to this question. The court overruled the objection, and the defendants then and there duly excepted.

On cross-examination the said William Pruitt, Sr., stated that when the crowd returned to his yard gate all they said was, "They reckoned that William and Wiley Pruitt would not report any more stills," and on further examination the witnesses stated that his wife called to them to return the gun at the yard gate which they had taken from the house when they carried Wiley away. Whereupon the defendant's counsel asked the witness the following question:

Q. What you stated awile ago, then, was not true?

To this question counsel for the Government objected. The court sustained the objection, and the defendants then and there duly excepted.

The witness Wiley Pruitt, among other things, in his cross-examination stated that when the whipping was over and when they had

got to the house of William Pruitt, Jr., the witness said that he wanted to stop in there, but they, the crowd, would not let him.

To this last statement the defendants objected then and there, on the ground that it was irrelevant and immaterial; which objection the court overruled, and the defendants then and there duly excepted.

Counsel for the Government then asked the said witness the following question:

Q. Were you and William together, then?

To this question the defendants objected, on the ground that it was immaterial. The court overruled this objection, and the defendants then and there duly excepted.

Witness also further testified that there were fifteen or
20 twenty in the crowd that took him and his brother from their houses and whipped them. Defendants' counsel then asked the witness whether he swore positively before the grand jury that there were twenty-seven men present when he was whipped.

To this question the counsel for the Government objected and the court sustained the objection.

The witness Wesley Pruitt testified, among other things, that when the crowd of men returned to the house of William Pruitt, Sr., with Wiley Pruitt, he concealed himself near the road. Just as the crowd was leaving the house of the said William Pruitt, where they had left Wiley Pruitt after the whipping, three of the number who were leaving the house came and sat down on a rock near where the said witness was concealed in the bushes, and that he recognized them as the defendants Todd, Roberts, and Mitchell; that others of the party came on behind these three men a short distance and reached them in a minute or two, when these three men got up and went off with them, and there were altogether fifteen or sixteen men; that while these three men were sitting on the rock and before the others came up witness heard defendant Todd say, "I reckon the boys will stop reporting now," and also, "I guess Joe Arnold will be very proud when he hears of this;" that the defendant Roberts at the same time and place said that he "guessed they would not report any more men for intimidation or any more for distilling."

The defendants moved the court to limit the testimony of this witness as to the statements made by defendants Todd and Roberts to the defendants who were stated by the witness to be present at the conversation, namely, defendants Todd, Roberts, and Mitchell, and that the court instruct the jury that the testimony was limited to these last three defendants. This motion the court overruled, and the defendants other than Todd, Roberts, and Mitchell each then and there duly excepted.

21 This witness further testified that he followed defendant Todd to his home from the point where the said conversation was had.

The written testimony taken down and sworn to and signed by

witness before Circuit Court Commissioner Robert Charlson on preliminary examination of this case was exhibited to him, and he was asked to look at it; whereupon the court remarked, "The commissioner may have gotten it wrong."

To this remark of the court the defendants then and there duly excepted.

Witness was then asked by defendants if he did not swear before said commissioner at said preliminary examination that other parties than those he now identified were present and took part in the whipping, and that he recognized them, and by way of refreshing his recollection he was asked to look at said testimony taken down by said commissioner at said time and signed by the witness.

Witness stated that he did not so testify.

Defendants' counsel on cross-examination asked William Pruitt if when he made his affidavit in this case before the commissioner, Charlson, he had not sworn that Mr. Bartlett and Rob't Johnson were present at the whipping and would testify to same facts he had stated, or that in substance, and by way of refreshing his recollection he was shown the affidavit spoken of, signed by himself, as admitted by him.

Witness stated that he signed the affidavit, but had not so sworn, and that Johnson and Bartlett were not present.

The witness William Pruitt testified, among other things, that he had known John Simms and George Simms for about twelve years intimately; that he knew them by their faces; that he had seen them very often, seeing them at least three or four times a month, and that he also knew Will Simms, their brother.

Witness was then asked by counsel for the Government, "Did you know him, Will Simms, about like you did the other Simms boys?" To which the witness answered, "Yes, sir; the same."

22 Defendants objected to the statement of the witness that he knew Will Simms like he did the Simms boys; which objection was overruled by the court, and the defendants duly excepted.

Witness William Pruitt was asked by defendants' counsel on cross-examination if there were not some indictments against said witness in the State courts in Alabama; to which he answered that there were. Thereupon witness stated during said cross-examination that Robert Dickson, the sheriff of Cherokee county, who was also a witness in this case, told witness and his brother Wiley that they never would have been arrested on these charges in the State courts if it had not been for this new charge—that is, for the charge that they brought against these defendants in this case. Thereupon the counsel for the defendants asked the witness the following question: "Don't you know you left the country—ran away and left the country—and that these indictments were not filed until after his, Dickson's, term of office?" To which the witness answered, "I went to Georgia—yes, sir; but did not run away." Witness was then asked by counsel for defendants the following question: "Wasn't

you under the charge of the bailiff and stole a man's buggy there?" To the above question counsel for the Government objected. (The witness answered, "That is not so)," and the court sustained the objection; to which the defendants objected, but there was no order or ruling of the court by which this testimony was excluded from the jury.

Marion Copeland, who was one of the defendants and who plead guilty to the charge, was then introduced as a witness for the prosecution. Counsel for the prosecution, among other things, asked witness the following question: "Now, give us the names of any of the other persons there that night who are not here" (meaning who were not present during the trial).

23 Counsel for the defendants objected to this question; which objection was by the court overruled, and the defendants then and there duly excepted.

The witness Marion Copeland was asked by counsel for the defendants on cross-examination, "Had you heard of their (meaning William and Wiley Pruitt) being accused of killing people's stock?" To which the witness answered, "Yes, sir; I heard that they were accused of that, but I do not know it myself." The witness was then asked by counsel for defendants, "Don't you know they were accused of stealing, too?" To this question counsel for the prosecution objected; which objection was by the court sustained, and the defendants duly excepted.

The witness L. E. Parsons, after stating that he was the former United States attorney for the northern district of Alabama and was such attorney about a month ago, was then asked, "Was any inducement offered him (meaning the witness Marion Copeland) in your presence, either by Mr. Daniels, a deputy marshal, or by Mr. F. S. White, special counsel for the Government, or any one else?" To which the witness answered, "No, sir; none whatever. I did not know Copeland until he came in there with Daniel. He, Copeland, told me then that he wanted to make a statement to me."

Defendants objected to the above statement; which objection was by the court overruled, and the defendants duly excepted.

The above testimony was offered by the Government to meet some evidence introduced by the defendants to the effect that Marion Copeland, the witness, who was one of the defendants and who had pleaded guilty to the charge, had been offered inducements either by the United States attorney or by Deputy Marshal Daniel to make his confession and statement. The witness Parsons then went on to state that he told the defendant Marion Copeland that if he made a statement it must be of his own free will and accord; that he would not make any promises to him of any kind whatever; that he would just simply have to make it of his own free will and take the consequences, if he saw fit to do so; that he,
24 Copeland, must be the judge of that; that he, Parsons, would not do anything to induce him to make a statement against the defendants or anything of the sort. The witness Parsons then

said that that was the statement made to the witness Copeland, and that he thought F. S. White, special counsel for the Government, was present at the time.

On objection by counsel for the defendants the court excluded the statement made by the witness Parsons to the effect that Copeland made a statement to him from the jury.

The witness Marion Copeland, being recalled, among other things stated that he came to Birmingham a few days before court met to see the United States attorney or some other officer of the United States to obtain protection; that these defendants were threatening to kill him or do him some great bodily harm if he testified in this case or gave any information to the United States officers leading to their discovery or guilt, but that he failed to see the United States attorney, Mr. Parsons, or the special ass't counsel in this case, Mr. White, but did see the clerk of the court. Thereupon he was asked the following question by the prosecution:

"You told him, the clerk, that you wanted some protection, didn't you?

A. Yes, sir.

Q. You came to the office of Mr. White, the special assistant counsel in this case, hunting for him, didn't you?

A. Yes, sir."

He was further asked:

"Did you see Mr. White's clerk on that occasion?

A. I saw him.

Q. You left a message with him for Mr. White, didn't you, that they were going to kill you?

A. Yes, sir."

Defendants' counsel objected to the above; which objection was by the court overruled, and the defendants duly excepted.

This testimony was brought out by the Government to meet some of the defendants' testimony tending to show that the witness had been offered inducements by the Government to plead guilty and testify in this case; and, further, to meet some evidence of the defendants tending to show that he had been threatened by these defendants that if he testified in this behalf or gave information to the United States officers which would implicate the defendants in the crime charged against them they would do him bodily harm, and to meet some of the evidence offered by the defendants tending to show that the witness came to Birmingham at that time to employ counsel in his own behalf and have witnesses summoned for his own defense; and, further, to meet some evidence of the defendants tending to show that said witness had employed counsel in his own defense and had made affidavit that he could prove certain facts which would exculpate him from the charge, all of which witness stated was made under duress and fear that the defendants would do him bodily harm unless he did employ counsel in his defense and have witnesses summoned and make affidavits

exculpating him from the crime charged, and also to meet certain testimony of the defendants tending to show that inducements had been held out to the witness by the officers of the United States to prevail upon him to plead guilty and testify against these defendants.

The witness also stated that one said trip he came to Birmingham at the instance of the defendants to see Col. Altman, their attorney, and to see about getting witnesses for the defendants in this case—that is, that was the ostensible purpose, that he came at the instance of the defendants and led them to believe that that was his business here, when in fact he came to see the United States officials to get protection, as above stated; that on said trip he did not go to see Col. Altman or get any witnesses. The defendant was thereupon asked this question by the prosecution: "You came here ostensibly to see him—that is, Col. Altman, I mean. State whether or not that was what you led Todd and the other defendants to believe you came for?" To which he answered "Yes, sir."

Defendants' counsel objected to this question because it
26 was leading; which objection was by the court overruled, and the defendants excepted.

The witness was then asked the following question-:

"You say you came at the suggestion of the defendant Todd and the other defendants to employ Mr. Altman?

A. Yes, sir.

Q. Now, did they or not believe that was your business here—did they understand that was your business?

A. Yes, sir.

Q. Did you tell them that was what you were coming here for?

A. Yes, sir."

Defendants objected to the above questions; which objection was by the court overruled, and the defendants thereupon duly excepted.

Some of the testimony tended to show that the witness Marion Copeland had stated that W. L. Daniel, a deputy U. S. marshal, had offered him $200, when he was at large, to surrender himself and plead guilty and turn State's evidence in this case. To meet said testimony the prosecution asked said witness the following question: "Did he, Daniels, ever offer you any such sum of money as that or anything of that kind?" To which the witness replied, "No, sir; he did not."

Q. Did he ever offer you anything?

A. No, sir.

To meet the testimony above mentioned the witness was also asked by the prosecution if he ever made known to any one his desire to surrender when he was at large and enter a plea of guilty to this action.

The defendants objected to this question; which objection was

by the court overruled, and the defendants then and there duly excepted.

The witness answered that he made it known to his father and to Taylor Brock, one of the men who were indicted in this case, but whose case had been nol-prossed and who was not guilty of the offense.

The witness was then asked, "Did your father make you any promise or offer you any inducement to come here and plead guilty?"

27 The defendants objected to this question because it was leading and because it called for the opinion of the witness as to what occurred, if anything did occur; which objection was by the court overruled, and the defendants duly excepted.

Witness answered he did not.

The witness Marion Copeland further testified that on Friday, a day or two after the whipping of the Pruitts, at the instance of Will Mitchell, one of the defendants, he and Mitchell left the State, traveling through the woods, and finally stopping in Georgia; that they left the State to avoid arrest; that they knew the officers were in the neighborhood, making arrests of the other defendants, and were looking for them at the time they fled.

The proof further showed that Will Mitchell and the witness had remained several months in Georgia to avoid arrest in this case.

To meet some of the testimony of the defendants which tended to prove that the witness Marion Copeland had been offered inducements by United States officers to surrender himself, plead guilty, and make a statement of the facts in this case, the witness Copeland was asked how he came to give it away, meaning how he came to state the facts in the case to the officers and testify in this case; to which question he answered, "Just because I felt it my duty to give it away."

The defendants objected to this question and answer; which objection was by the court overruled, and the defendants duly excepted.

The witness was then asked, "Why did you feel it your duty to give it away?" to which he answered, "Because I knew there were innocent men indicted and under arrest for it."

The defendants objected to this question and answer and moved that the same be excluded; which said objections and motion were by the court overruled, and the defendants duly excepted to each of said rulings.

28 The witness R. S. Dickson, introduced by defendants, testified that he knew the general character of William Pruitt in the neighborhood in which he lived, and that it was bad. Defendants' counsel then asked the witness the following question: "Do you know his general character for thevishness?"

To this question counsel for the Government objected; which objection was by the court sustained, and the defendants excepted.

On redirect examination defendants' counsel asked the witness George McGee the following question: "What was the reputation of these men (meaning the defendants) in that community as being temperance men—temperate and opposed to making or selling liquor?"

This question was objected to by counsel for the Government; which objection was sustained, and the defendants duly excepted.

"Q. What was their reputation in the neighborhood—the reputation of these defendants—as to sobriety?"

Defendants' counsel stated they proposed by said question to show said character good.

To this question counsel for the Government objected; which objection the court sustained, and the defendants duly excepted.

On said redirect examination defendants' counsel asked said witness the following question: "What was their reputation as to whether they favored or were opposed to illicit distilling?"

Defendants' counsel stated they proposed by said question to show they had the reputation of opposing it.

To this question counsel for the Government objected; which objection was by the court sustained, and the defendant- duly excepted.

The witness Leander Copeland, a witness for the Government, said, among other things, that he was the father of Marion Copeland, the defendant who had pleaded guilty and turned state's evidence in this case. This witness testified that Marion Copeland came to him before he was arrested in this case and had a talk with him.

29 Counsel for the Government then asked this witness: "Did he or not admit his guilt in this matter?"

Defendants' counsel objected to this question; which objection the court overruled, and the defendants duly excepted.

Witness answered he did admit his guilt; to which defendants objected, and the court overruled said objection, and the defendant- then and there duly excepted.

Some of the testimony of defendants had tended to show that the above-named Marion Copeland had been induced by promises of pecuniary reward after he had been arrested to admit his guilt. The witness above named, Leander Copeland, testified that his son came to him and, without any inducement whatever being made to him, had made the statement voluntarily to him admitting his guilt. Said witness was then asked by counsel for the Government the following question: "Did he say who was with him?" to which the witness answered, "He gave the names of those men you have here and some that I never saw that I know of or ever heard of before." Witness was then asked, "Do you remember who they were?."

Counsel for the defendants objected to this question and moved

to exclude the statement of the witness because it could not be used as evidence against these defendants. Counsel for the Government then stated that it was not offered as evidence against these defendants and did not effect the other men, but only went to the credibility of witness, it having been attempted to be shown by the defendants that said witness had been induced by promise of financial reward to make a confession, and while in the presence and under the influence of the defendants had denied any participation in the commission of the crime. The above testimony was stated by Government counsel to be only introduced for the purpose of showing what the witness first said when not under the influence of the defendants and before any reward could
30 possibly have been offered him on the subject, and was only intended to go to his credibility. The motion of the defendants above mentioned was overruled, and the defendants excepted.

The witness was then asked, "Who else besides these did he say were with him at the time of the whipping?"

To this question the defendants objected; which objection the court overruled, and the defendants excepted.

Said witness then stated that the said Marion Copeland told him that certain ones who had been indicted were innocent, namely, the defendants that the said witness in his statement on the stand said were innocent and whose cases had been nol-prossed by the Government, and that his purpose was to come home and surrender himself to the authorities and take the consequences; that he did not want these innocent defendants (whose cases had been nol-prossed) to be punished for a crime that they were not guilty of.

Counsel for the Government offered to read in evidence an affidavit made by D. M. Beck, who is the same individual as Mark Beck, one of the defendants, heretofore made by said D. M. Beck, which was made in order to have certain witnesses in his defence summoned at the expense of the Government, and in which said affidavit the said D. M. Beck set out in detail what he expected to prove by said witnesses, and in which said affidavit the said D. M. Beck swore that he expected to prove by one Tom Strawn that he, the said Tom Strawn, slept with the said D. M. Beck on the night of the 4th of March, 1893, the night when the offence charged in the indictment was committed, and that the said Strawn and said Beck slept together at the house of one M. K. Beck, and that the said D. M. Beck did not leave the room that night. This testimony was introduced to meet the testimony of one Kitsinger, who was introduced by said D. M. Beck and stated that he spent the night of the 4th of March, 1893, with the said D. M. Beck at the
31 house of one Mike Beck, and that the above-named Tom Strawn was not at said house on said night and did not sleep with the said D. M. Beck on that night.

To the introduction of this affidavit the defendants objected because it was irrelevant, and, the objection being overruled, they then and there excepted.

Counsel for Government then offered to read in evidence a statement made by defendant Henry Roberts on oath, which statement had been made by the said Henry Roberts in order to obtain witnesses to be summoned at the expense of the Government in his behalf, in which said affidavit the said Henry Roberts swore that one John Tippins spent the night with him, the said Henry Roberts, on the 4th of March, 1893, the night when the offence charged in the indictment was committed, at his, the said Henry Roberts', house, the said John Tippins having been examined as a witness in this case, and testified that he did not stay with the said Henry Roberts at his house on said night and did not sleep with him and was not there on that night; that the said Henry Roberts had tried to get the said John Tippins to testify that he did stay and sleep with him that night, but that the said Tippins declined to do so.

Counsel for the Government then offered to read in evidence the affidavit of the defendant Sam. Sims, which the said Sam. Sims had heretofore made for the purpose of having witnesses summoned at the expense of the Government in his behalf, in which said affidavit the said Sam. Sims swore that he could prove by one Thomas Starling that he, the said Sam. Sims, slept with the said Thomas Starling on the night of the 4th of March, 1893, the night when the offence charged in the indictment was committed, and also that the said Sam. Sims did not leave the bed or room *room* that night, the said Thomas Starling having been examined as a witness in this case and having stated that he had not slept or staid with
32 the said Sam. Sims on the night of the 4th of March and was not with him that night.

Counsel for the Government then offered to read in evidence the affidavit *if* Henry Stimson, one of the defendants, heretofore made in this case, in which the said Henry Stimson stated that he could prove by one W. M. Bray that the said Bray spent the night with the said Henry Stimson of the 4th of March, 1893, the night when the offence charged in the indictment was committed, and slept in an adjoining room and knew that the said Henry Stimson retired that night and remained in his bed all night, the said W. M. Bray having been examined as a witness in this case and having testified that he did not spend the night of the 4th of March, 1893, with the said Henry Stimpson and was not at his house that night, and that the said Henry Stimson had endeavored to get him to swear that he was there and remained all night, but that he had declined to do so.

To the introduction of all the above affidavits the defendants objected; which objection was by the court overruled, and the defendants then and there excepted to the ruling of the court in allowing the introduction of each and every of said affidavits.

Defendants while they were delivering their testimony offered the testimony of Wiley Pruitt, taken down by Commissioner Charlson on preliminary examination of this cause and signed by said Wiley, which predicate was laid on the cross-examination of said witness, as shown in a preceeding part of this bill of exceptions, in

which said testimony he had stated that other parties than those he now identified were present and took part in the whipping, and that he recognized them. Defendants stated that they offered
33 it for the purpose of contradicting said witness by showing contradictory statements made in a former trial. To the introduction of this evidence the Government's counsel objected. The court sustained said objections, and the defendants then and there duly excepted separately and generally.

Defendants while delivering their testimony offered the affidavit of William Pruitt, made before Robert Charlson, commissioner in this case, for which they had laid the predicate on cross-examination of said witness, as shown in a preceeding part of this bill of exceptions, in which affidavit he had stated that Mr. Bartlett and Robert Johnson were present at the whipping and would testify to the same facts that he had stated, and which Bartlett and Johnson, being sworn and examined, had stated was untrue. Defendants offered this affidavit for the purpose of contradicting said witness by showing contradictory statements made in said affidavit. The Government's counsel objected to the introduction of this affidavit. The court sustained said objection, and defendants then and there separately and generally duly excepted.

The evidence having been closed, the court charged the jury orally, and among other things the court in its oral charge said: "When there is an irreconcilable conflict of testimony as to any material matter in a cause, as when an alibi is sought to be established for a defendant whose guilt the evidence for the prosecution tends to establish more or less conclusively, and the defendant is shown by the evidence in the cause to have the means of producing testimony to prove that he was elsewhere at the time the offence was committed, and having attempted to prove such alibi,
34 the failure to produce such evidence is *is* a circumstance to be weighed against him." To this part of the oral charge the defendants then and there duly excepted.

The evidence having been closed, the court charged the jury orally, and among other things the court in its oral charge said: "It is here insisted on the part of the defence that even if the jury believe from the evidence that the defendants were of the band of men who assaulted the Pruetts on the night of the 4th of March last that will not justify a verdict of guilty against them unless the jury further finds that the cause and motive for the assault and whipping was that charged in the indictment. This is correct, but it is not questioned that this assault and whipping of the Pruetts on the night of the 4th of March last was lawless and wicked conduct, without justification or excuse under any law, human or divine, and the character of this conduct is fair matter for the consideration of the jury in connection with the proof relied on to show that the whipping was in whole or in part for the specific cause charged in the indictment." To this part of the oral charge the defendants then and there duly excepted.

The evidence having been closed, the court charged the jury orally, and among other things the court in its oral charge said:

"Even if it appears from the evidence that some of the parties to the transaction of the night of the 4th of March last at the Pruetts' houses were influenced in what they did and combined to do by motives other than charged in the indictment, such as general meanness or other alleged characteristics of the Pruetts, yet if you find it was any part of the purpose and motive of the conspirators to assault and whip the Pruetts on account of their having testified in the case of the United States against Kelly, Arnold, and
35 Farmer, that is sufficient to fix and establish the jurisdiction of the court." To this part of the oral charge the defendants then and there duly excepted.

The evidence having been closed, the court charged the jury orally, and among other things the court in its oral charge said: "If there was probable cause to believe these defendants had violated the laws of the United States and were proceeded against under the forms of the law, then there is no cause for complaint and no complaint will be heard that they are brought to trial here in this court and not in the State courts of Cherokee county." To this part of the oral charge the defendants then and there duly excepted.

The evidence having been closed, the court charged the jury orally, and among other things the court in its oral charge said: "If you are satisfied from the evidence in this case, beyond reasonable doubt, that William and Wiley Pruitt were assaulted by a band of disguised men, who had conspired and agreed to do it and actually carried it out, and this was done, as charged, on account of the fact that they (the two Pruetts) had testified in an examining court held by one Robert Charlson, an acting United States commissioner, and that the defendants were parties to and participated in the whipping, then your verdict must be guilty." To this part of the oral charge the defendants then and there duly excepted.

The defendants asked the court to give the following charges to the jury, which charge was presented to the court then and there in writing: "The court charges the jury, if the jury believe all the evidence in the case, they will find the defendants not guilty."
The court refused to give the said charge and marked the
36 same "refused." To the action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge to the jury, which charge was presented to the court then and there in writing. "The court charges the jury, if the jury believe from the evidence that the Pruitts were whipped for their thievishness and killing people's stock, they must acquit. If the jury believe the testimony of Marion Copeland, they must acquit the defendants." The court refused to give the said charge and marked the same "refused." To this action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge to the jury, which charge was presented to the court then and there in writing: "If the jury believe from the evidence that any witness

has sworn falsely in one material particular, the jury may disbelieve such witness entirely." The court refused to give such charge and marked the same "refused." To the action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge to the jury, which charge was presented to the court then and there in writing: "If the jury believe the testimony of the Government witnesses unworthy of credit, they must acquit the defendants." The court refused to give said charge and marked the same "refused." To the action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge to the jury, which charge was presented to the court then and
37 there in writing: "If the jury believe from the testimony of Marion Copeland and wife that the Pruitts were whipped on account of their thievishness and killing people's stock, then defendants cannot be convicted." The court refused to give said charge and marked the same "refused." To this action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge to the jury, which charge was presented to the court then and there in writing: "If from the evidence the jury have a reasonable doubt whether either of defendants did assault, beat, bruise, or wound with weapons Wiley and William Pruitt on account of their having testified before Commissioner Charlson against Arnold, Farmer, and Kelley, they must acquit such defendants." The court refused to give said charge and marked the same "refused." To the action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge to the jury, which charge was presented to the court then and there in writing: "The court charges the jury that if from the evidence the jury have a reasonable doubt whether either of the defendants did combine, conspire, and confederate together by force and intimidation and threats to injure Wiley Pruett and William Pruett on account of their having testified as witnesses in a cause tried before Charlson, as commissioner, then such defendants must be acquitted." The court refused to give said charge and marked the same "refused." To the action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge
38 to the jury, which charge was then and there presented to the court in writing: "The court charges the jury that in the indictment under which the defendants are tried they are charged with a conspiracy, by force and intimidation and threats, to injure Wiley and William Pruett on account of having been witnesses before Commissioner Charlson against Arnold, Farmer, and Kelley. Now, if the jury have a reasonable doubt from the evidence whether the conspiracy was to whip them on account of their thievishness, cutting up people's stock, or threatening to burn

barns and churches, the jury must acquit the defendants." The court refused to give said charge and marked the same "refused;" to the action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge to the jury, which charge was presented to the court then and there in writing: "If the jury believe from the evidence that the Pruetts were whipped on account of their thievishness and cutting people's stock, then they must find the defendants not guilty." The court refused to give said charge and marked the same "refused." To the action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charges to the jury, which charge was presented to the court *and* then and there in writing: "If the jury have a reasonable doubt whether the Pruitts were whipped, if they were whipped, on account of their thevishness, cutting people's stock, or threatening to burn houses, or whether they were whipped for testifying against Arnold, Kelley, and Farmer, they must give defendants the benefit of the doubt and acquit them." The court refused to give said charge and
39 marked the same "refused." To the action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge, which charge was presented to the court *and* then and there in writing: "The court charges the jury that if they believe from the evidence in this case that the Government has proven by its own witnesses that the conspiracy, if any was made by the defendants, was to punish the Pruitts for their thevishness and cutting people's stock or for threatening to burn people's houses, then the Government is bound by said proof and defendants cannot be convicted of the conspiracy charged in the indictment." The court refused to give said charge and marked the same "refused." To the action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge, which was presented to the court *and* then and there in writing: "If the jury find from the evidence that a witness has spoken an untruth as to one matter while testifying, they may disregard his or her testimony as to all matters." The court refused to give said charge and marked the same "refused." To the action of the court in refusing to give said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge, which charge was presented to the court then and there in writing: "If the jury find from the evidence that a witness has made one statement at one time and a different statement at another time, touching the same matter, this leaves the truthfulness of both statements in doubt, and the jury may reject both statements." The court refused to give this said charge and marked the same "re-

fused." To the action of the court in refusing to give said charge the defendants then and there duly excepted.

40 The defendants asked the court to give the following charge to the jury, which charge was presented to the court then and there in writing: "The court charges the jury that it is not sufficient to authorize a conviction in this case that the jury should believe from the evidence that a conspiracy was entered into by defendants, but if they believe from the evidence that an unlawful conspiracy was entered into by the defendants, then they must prosecute the enquiry further, and before a conviction can be had they must believe from the evidence, to a moral certainty, that such conspiracy was for the specific reason and purpose charged in the indictment, to wit, to injure Wiley and William Pruitt because they had been witnesses against Farmer, Kelley, and Arnold in a charge of intimidation before Commissioner Charlson; and if the jury have a reasonable doubt as to whether the conspiracy, if any is proven, was for the reason of the theivishness and general meanness of the Pruitts, or any cause than that charged in the indictment, the jury will give the defendant- the benefit of the doubt and acquit." The court refused to give said charge and marked the same "refused." To the action of the court in refusing to give the said charge the defendants then and there duly excepted.

The defendants asked the court to give the following charge to the jury, which charge was presented to the court then and there in writing: "Before the defendants can be convicted the jury must believe beyond a reasonable doubt that they conspired together, by force and intimidation and threats, to injure the Pruitts because said Pruitts had testified against Arnold, Farmer, and Kelley, and if they have a reasonable doubt about this being the reason of the conspiracy, they must acquit the defendants." The court refused to give the said charge and marked the same "refused." To the action of the court the defendants then and there duly excepted.

41 The defendants asked the court to give the following charge to the jury, which charge was presented to the court then and there in writing: "When the Government put Marion Copeland, Marion's wife, and Jerome Copeland on the stand it vouched for their credibility, and if the jury believe from their evidence, in connection with the other evidence, that the Pruitts were whipped, if they were whipped, on account of their theivishness and cutting of people's stock, then the jury will return a verdict of not guilty." The court refused to give said charge and marked the same "refused." To the action of the court in refusing to give said charge the defendants then and there duly excepted.

A verdict of conviction having been rendered by this jury, the defendants filed a motion in arrest of judgment as follows:

"In the District Court of the United States for the Southern Division of the Northern District of Alabama.

THE UNITED STATES OF AMERICA
vs.
J. W. TODD, HENRY ROBERTS, WILL SIMS, GEORGE SIMS, WILL Hooper, Samuel Sims, Jack Beck, Mark Beck, Marion Ray, Will Mitchell, Allen Lights, Henry Stimpson, Defendants.

Now comes the defendants in their own proper person and by counsel, viz., Denson & Burnett, W. H. Smith, and Bulger and Altman, and move the court to arrest the judgment and for a new trial in this cause for the following reasons:

42 First. The indictment is not sufficient in law to have put the defendants on trial, the defects in which are so patent that they are not cured by the verdict of the jury in this case; which defects are: 1st, the indictment does not charge specifically and clearly the purpose of the conspiracy attempted to be charged in the indictment; 2nd, it does not charge specifically and clearly that Wiley and William Pruitt, the parties alleged to have been assaulted and beaten, had ever at any time or place been witnesses in any court of the United States of America; 3rd, it is not alleged that the defendants knew, when the assaulting and beating is alleged to have taken place, that Wiley — —— Pruitt had been witnesses in any court of the United States of America; 4th, it is not alleged that when the alleged conspiracy was formed and entered into it was formed and entered into for the purpose of, by force or threats, or by assaulting, beating, bruising, and wounding with weapons the said Wiley and William Pruitt, to intimidate or injure said Pruitts. The alleged conspiracy was because they had been witnesses in any court of said United States; 5th, said indictment does not allege that the defendants conspired together for the purpose of by force, threats, or intimidation to injure Wiley and William Pruitt because they, the said Pruitts, had attended and fully, freely, and truthfully testified in any court of the United States of America.

The defendants also move in arrest of judgment and for a new trial in this cause, because the jury that tried this cause was allowed by the court, on its own motion and without the consent of the defendants, to disperse at each recess of the court and at night during each day of the trial and mingle with the people, and were not kept together at any recess of the court until after the arguments were concluded.

DENSON & BURNETT,
43 W. H. SMITH,
BULGER AND ALTMAN,
Attorneys for Defendants."

(Endorsed on back:) Filed July 28, 1893. N. W. Trimble, clerk.

The court overruled the said motion.

To the action of the court in overruling said motion the defend-

ants severally and separately then and there duly excepted to the action of the court in overruling said motion.

The defendants now tender this as their bill of exceptions and pray that the same may be duly signed and made a part of the record in this cause; and the same is done within the time prescribed by law, on, to wit, July 29th, 1893.

(S'g'd) JOHN BRUCE, *Judge.*

Endorsed: Filed as of July 29th, 1893, as per agreement. (S'g'd) N. W. Trimble, clerk.

44 *Petition for Writ of Error.*

In the District Court of the United States for the Southern Division of the Northern District of Alabama.

UNITED STATES OF AMERICA
vs.
J. W. TODD, HENRY ROBERTS, WILL SIMMS, JOHN SIMMS, GEORGE Simms, Will Hooper, Sam'l Simms, Jack Beck, Mark Beck, Marion Ray, Will Mitchell, Allen Lights, and Henry Stimpson, Defendants.

To the Hon. John Bruce, judge of the district court of the United States of America for the southern division of the northern district of Alabama:

Comes the defendants, J. W. Todd, Henry Roberts, Will Simms, John Sims, George Sims, Will Hooper, Sam'l Sims, Jack Beck, Mark Beck, Marion Ray, Will Mitchell, Allen Lights, and Henry Stimpson, who were prosecuted and convicted at the adjourned term of the district court of the United States of America for the southern division of the northern district of Alabama at an adjourned term of said court held at Birmingham, Alabama, which adjourned term of said court begun on the 19th day of June, 1893, and ended on the 1st day of August, 1893, under an indictment in words and figures in substance as follows, to wit:

In the District Court of the United States for the Southern Division of the Northern District of Alabama, March Term, A. D. 1893.

The grand jurors of the United States, elected, empanelled, sworn, and charged to enquire for the body of the said southern division of the northern district of Alabama, upon their oaths present—

That heretofore, to wit, on the fourth day of March, in the year of our Lord eighteen hundred and ninety-three, in the county of Cherokee, in said division of said district, and within the jurisdiction of said district court, J. W. Todd, alias Watson Todd;

45 George W. Kelley, Henry Roberts, Will Sims, John Sims, George Sims, Will Hooper, James McGhee, Sam'l Sims, James B. Bishop, Mike Beck, Jack Beck, Mark Beck, Marion Ray,

Taylor Brock, Jim Latham, A. D. Wilson, Will Mitchell, Marion Copeland, Jerome Copeland, Wils Brooks, Will Manley, Manly Copeland, Milton Farmer, Allen Lights, and Henry Stimpson and Nute Hale, whose Christian names and surnames respectively are to this grand jury otherwise unknown, unlawfully, corruptly, forcibly, and feloniously did combine, conspire, and confederate together by force and intimidation and threats to injure Wiley Pruitt and William Pruitt, who had theretofore been witnesses and testified against Joe Arnold, Milton Farmer, and George Kelley upon a charge of endeavoring to influence, intimidate, and impede witnesses in a court of the United States, in violation of the criminal laws of the United States, tried preliminarily by and before Robert Charlson, acting as a commissioner of the circuit court of the United States for said district, in their person and property on account of the said witnesses above named having testified in said cause in said court as aforesaid, and in pursuance of said conspiracy and to effect the object *the object* thereof the said defendants and each of them did assault, beat, bruise, and wound with weapons the said Wiley Pruitt and William Pruitt, contrary to the form of the statute in such case made and provided, against the peace and dignity of the United States.

LEWIS E. PARSONS, JR.,
United States Attorney.

Endorsed: "A true bill." E. R. Weems, foreman of the grand jury. Filed in open court this 18th day of March, 1893. N. W. Trimble, clerk.

46 And the said defendants further show that they and each of them were by said court duly sentenced to hard labor for a term of four years under said indictment and conviction thereon; and said defendants further show and aver that in the records and proceedings, and also in the rendition of the judgment on the plea, which is in said district court in the above-stated cause, manifest errors have happened, to the great damage of said defendants, as appears by the assignment of errors herewith filed. Wherefore said defendants and each of them pray that a writ of error may be duly issued by your honor, so that said errors may be reviewed by the Supreme Court of the United States of America, and that said writ may be made returnable as required by law.

(S'g'd) DENSON & BURNETT,
W. H. SMITH,
BULGER & ALTMAN,
Att'ys for Defendants.

Endorsed: Filed Sept'r 2nd, 1893. (S'g'd) N. W. Trimble, clerk.

47 *Assignment of Errors.*

In the District Court of the United States for the Southern Division of the Northern District of Alabama, at Birmingham, Alabama.

THE UNITED STATES OF AMERICA
vs.
J. W. TODD, ALLEN LIGHTS, GEORGE SIMS, SAM SIMS, H. B. STIMPSON, John Sims, Henry Roberts, Will Mitchell, Jack Beck alias E. J. Beck, Mark Beck, Marion Ray, Will Sims, Will Hooper, Defendants.

Comes the defendants in the above-stated cause, by their attorneys, and shows and avers that there is manifest error in the record and proceedings in said cause, to the damage and injury of said defendants, which error is apparent on said record in the following respects, which said errors are separately and severally assigned, presented, and insisted on:

1. The court below erred in refusing to grant the motion of the defendants for a severance.

2. The court erred in overruling each several ground of the demurrers of the defendants to the indictment.

3. The court erred in discharging the juror Douglass from the panel on motion of district attorney.

4. The court erred in refusing to allow the motion of counsel for defendants to have a full panel of jurors before being called on to pass on the jury.

5. The court erred in its rulings that the whole number of defendants should be allowed but three challenges of jurors.

48 6. The court erred in refusing to allow the defendants to challenge the juror McCullough.

7. The court erred in allowing the introduction of the papers in the proceeding before U. S. Commissioner Charlson, wherein Arnold, Kelley, and Farmer were charged with illicit distilling in violation of the United States statutes.

8. The court erred in allowing William Pruitt and Wiley Pruitt to remain in court during the examination of the other witnesses in the cause.

9. The court erred in allowing the question and answer thereto of William Pruitt, Sr., as follows: Do you know whether he is in the habit of swearing? Ans. Yes, sir; I think he is. This question and answer was in reference to Will Hooper, and was for the purpose of identifying him.

10. The court erred in overruling the objection of the defendants to the following question to the witness William Pruitt, Sr.: State what was done with reference to whether he (referring to Will Hooper) had any control over the others or commanded them or not.

11. The court erred in allowing the district attorney to ask

William Pruitt, Sr., the question following: Is he (referring to Will Mitchell) in the habit of swearing?

12. The court erred severally and separately in allowing the district attorney to ask the witness William Pruitt, Sr., the following question: What was the age of those children there? What was the age of Wiley's son and that grandson of yours? What is her (meaning witness'es wife) condition now? This witness had testified that his wife, grandson, and Wiley Pruitt's son were present at Wiley's house on the night of the 4th of March, 1893, when Wiley was taken from his house, and that his wife had a struggle with one of the defendants.

49 13. The court erred in allowing the witness William Pruitt, Sr., to state that "she (meaning his wife) is not able to come."

14. The court erred in refusing to allow the counsel for defendants to ask William Pruitt, Sr., the question, What you stated awhile ago was not true then, was it? The witness had stated that all he heard them say at Wiley Pruitt's yard-gate was that they reckoned they would not report any more stills, and, on being further questioned, said his wife called on the defendants for his grandson's gun. Whereupon he was asked the last-named question.

15. The court erred in refusing the motion in behalf of defendants other than Todd and Roberts, Mitchell and Wilson to limit the testimony of Wesley Pruitt as to the conversation overheard by said witness while on the roadside to such defendants only as were shown to be present at said conversation. This conversation was had, as stated by the witness on the night *of* the offense is alleged to have been committed and after the time of the alleged whipping and return home of William and Wiley Pruitt, and consisted of certain declarations of the defendants Todd and Roberts, in substance that Todd and Roberts, one or both, said he reckoned the boys will stop reporting now, and that Arnold will be powerful proud when he hears of this.

16. The court erred in refusing to grant the motion to exclude the conversations of Todd and Roberts from the jury except as against defendants Todd, Roberts, Mitchell, and Wilson. This is the same conversation referred to — assignment number 15, next immediately preceding. The witness only identified Todd, Roberts, and Mitchell.

17. The court erred in stating that the commissioner may have got the evidence of the witness Wiley Pruitt as taken on preliminary examination wrong.

50 18. The court erred severally and separately in allowing the witness Charlie Pruitt to answer these questions: How old was your youngest child? How old was the youngest one with you? The witness is shown to be the wife of Wiley Pruitt and was not present where Wiley Pruitt is alleged to have been taken from the house of William Pruitt, Sr.

19. The court erred in allowing the witness Wiley Pruitt to testify that the charges against Joe Arnold, Milton Farmer, and George Kelley as to which he testified was a charge of intimidating United States witnesses.

20. The court erred in allowing the district attorney to ask this question of Wiley Pruitt: "What was the nature of the charge against them," meaning against Farmer, Arnold, and Kelly.

21. The court erred in allowing the witness Wiley Pruitt to state that he wanted to stop in at William Pruitt's after the alleged whipping.

22. The court erred in allowing the district attorney to ask the witness Wiley Pruitt the following question: "Were you and William together then?"

25. The court erred in refusing to allow the defendants' counsel to ask Wiley Pruitt whether he swore positively before the grand jury that there were 27 men present when he is alleged to have been whipped.

24. The court erred in allowing the witness Wm. Pruitt, Jr., to testify that the character of the road from his house to the place — the alleged whipping was rocky.

25. The court erred in allowing the district attorney to ask the witness Wm. Pruitt, Jr., whether he knew Will Simms about like he did the other Simms boys.

26. The court erred in allowing the district attorney to ask the witness Wm. Pruitt, Jr., whether others were at the alleged
51 whipping and who they were.

27. The court erred in allowing the witness Wm. Pruitt, Jr., to state that after the alleged whipping Wiley Pruitt said he wanted to stop at witness's house.

28. The court erred in refusing to allow defendants' counsel to ask the witness Wm. Pruitt, Jr., the following question: "Wasn't you under the charge of the bailiff and stole a man's buggy there?"

29. The court erred in stating that counsel for defendants bad put a question to the witness Mattie Pruitt that was misleading. The question referred to was, You don't know whether this was 1875 or 1876, do you. To which the witness replied, No; I do not know which it is.

30. The court erred in refusing to allow defendants' counsel to ask the witness Mattie Pruitt if she ever had a conversation with Jim Wilder about this matter, referring to the alleged whipping.

31. The court erred in allowing the district attorney to ask the witness Marion Copeland this question: Now, give us the names of any of the others that were there that night that are not here.

32. The court erred in allowing the witness Marion Copeland to state that he told them (meaning defendants) he did not want to go, meaning to go and take part in the whipping.

33. The court erred in refusing to allow defendants' counsel to ask the witness Marion Copeland this question: Don't you know they (meaning Wm. and Wiley Pruitt) were accused of stealing, too?

34. The court erred in allowing this question to be asked the witness Marion Copeland by the district attorney: State whether when you made these statements they were freely and voluntarily made or were they forced on you.

35. The court erred in allowing the district attorney to ask
52 L. E. Parsons the following question: Was any inducement offered Marion Copeland in your presence either by yourself, Tobe Daniels, myself, or any one else? This witness had testified he was formerly district attorney, and it was shown that a conversation was had at his office about a month before the trial between him and said witness and the assistant district attorney about what he, the witness, would say about the case.

36. The court erred in allowing the witness Parsons to say Copeland told him he wanted to make a statement to him.

37. The court erred in allowing the prosecution to ask the witness the following question: What did you say to Marion Copeland, without stating what he said?

38. The court erred in refusing to allow defendants' counsel to ask Bob Johnson the following question: Do you know the general character of Wm. Pruitt, Sr., William Pruitt, Jr., Wiley Pruitt, and Wesley Pruitt in the community in which they live?

39. The court erred in refusing to allow the defendants' counsel to ask the witness Wm. Pruitt, Jr., the following question: Did you tell him (Jno. Cole) the night you got out of jail, at his house, that a fellow by the name of Friers brought a file in the jail, and that you and Friers filed out, and that the arrangement between you and Friers and Wiley was that you and Friers should get out, and if the jailer saw you that you would kill him?

40. The court erred in allowing the assistant district attorney to ask the witness Marion Copeland the following question: You left a message for me, didn't you, that they were going to kill you?

41. The court erred in allowing the witness Marion Copeland to answer the question set out in the next preceding assignment of error.

53 42. The court erred in allowing the assistant district attorney to ask the witness Marion Copeland the following question: And you came here ostensibly to see him (meaning Mr. Altman, in counsel for defendants). State whether or not that was what you led Todd and those other people to believe you came here for.

43. The court erred severally and separately in allowing the assistant district attorney to ask the following questions: Now, did they (Todd and Simms) believe that was your business down here? Did they understand that was your business, or did you tell them that was what you were coming down here for? The witness had stated that he come here (to Birmingham) at the suggestion of Todd and Simms to employ Mr. Altman as his attorney in the cause.

44. The court erred in allowing the assistant district attorney to ask the witness Marion Co-eland the following question: Did you ev-r make known to anybody your desire to surrender and enter plea of guilty?

45. The court erred in allowing the witness Marion Copeland to state that he told his father what he came back to do. The witness had stated that he had left the country soon after the time of the

alleged whipping and came back afterwards and surrendered himself.

46. The court erred severally and separately in allowing the assistant district attorney to ask the witness Marion Copeland the following questions: Did your father make you any promise or offer you any inducement to come up here and plead guilty? Did Taylor Brock offer you anything?

47. The court erred in allowing the assistant district attorney to ask the witness Marion Copeland the following question: Ay whose suggestion did you go down there (meaning in Clay county, Ga.), if anybody's suggestion?

54 48. The court erred in refusing to exclude the statement of the witness Marion Copeland that Will Mitchell, one defendant, sent word for witness to come to Sol. Webb's.

49. The court erred in refusing the statement of the witness Marion Copeland that he and Joel Bartlett left his (witness') home a few days after the alleged whipping of the Pruitts and went to Georgia, stopping at the house of Mr. Webb; that they went through the woods nearly all the way and arrived *in* Webb's on Saturday after the alleged whipping.

50. The court erred in allowing the assistant district attorney to ask the witness Marion Copeland the following question: How come you to give it (meaning his connection and the connection of the other defendants with the alleged whipping of the Pruitts) away?

51. The court erred in allowing the witness in the next preceding assignment of error to answer: Just because I felt it my duty to give it away.

52. The court erred in allowing the witness Marion Copeland to state in reply to a question of the assistant district attorney that he gave the matter away because he knew there were innocent men in it.

54. The court erred in its ruling in refusing to exclude the testimony of Marion Copeland as follows: "I believe Joel Bartlett told me they were going to have a meeting out there that night."

55. The court erred in admitting the statement of the witness Marion Copeland in which he said: "I believe Joel Bartlett told me they were to have a meeting out there that night."

56. The court erred in refusing to allow the counsel for defendant- to ask the witness J. T. Stout the following question: "Do you know the general character of these defendants in the community in which they lived?"

55 57. The court erred in overruling the motion of the defendants' coun- asking that defendants be allowed to ask this question: "Do you know the general character of these defendants in the community in which they live?"

58. The court erred in refusing to allow the defendants' counsel to ask the witness J. T. Stout the following question: "Do you know the character of the defendant Todd in the community in which he lived?"

59. The court erred in refusing to allow the defendants' counsel

to ask the witness Stout the following question: "Do you know the general character of each of these gentlemen I have asked about for peace and quiet in the community in which they live?"

The witness Stout had testified in reference to the general character of the defendants Todd, George Simms, Marion Ray, Jack Beck, and Mark Beck.

60. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Todd in the community in which he lives for peace and quiet?"

61. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Henry Roberts in the community in which he lives for peace and quiet?"

62. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Will Simms in the community in which he lives for peace and quiet?"

63. The court erred in refusing the defendants' counsel to ask the witness Stout the following question: "Do you know the
56 general character of the defendant Jno. Simms in the community in which he live- for peace and quiet?"

64. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant George Simms in the community in which he lives for peace and quiet?"

65. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the d-fendant Will Hooper in the community in which he lives for peace and quiet?"

66. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Will Hooper in the community in which he lives for peace and quiet?"

67. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the d-fendant Sam'l Simm in the community in which he live- for peace and quiet?"

68. The court erred in r4fusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the d-fendant Jack Beck in the community in which he lives for peace and quiet?"

69. The court erred in refusing to allow the d-fendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Mark Beck in the community in which he lives for peace and quiet?"

70. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you
57 know the general character of the defendant Marion Ray in the community in which he lives for peace and quiet?"

71. The court erred in refusing to allow the defendants' counsel

to ask the witness Stout the following question: "Do you know the general character of the defendant Will Mitchell in the community in which he lives for peace and quiet?"

72. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the d-fendant Allen Lights in the community in which he lives for peace and quiet?"

73. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Henry Stimpson in the community in which he lives for peace and quiet?"

74. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Todd in the community in which he lives as a peaceable, law-abiding man, or to the contrary?"

75. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Henry Roberts in the community in which he lives as a peaceable, law-abiding man, or the contrary?"

76. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Will Simms in the community in which he lives as a peaceable, law-abiding man, or the contrary?"

77. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you
58 know the general character of the defendant John Simms in the community in which he lives as a peaceable, law-abiding man, or the contrary?"

78. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant George Simms in the community in which he lives as a peaceable, law-abiding man, or the contrary?"

79. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Will Hooper in the community in which he lives as a peaceable, law-abiding man, or the contrary?"

80. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Sam'l Simms in the community in which he lives as a peaceable, law-abiding man, or the contrary?"

81. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Jack Beck in the community in which he lives as a peaceable, law-abiding man, or the contrary?"

82. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Mark Beck in the community in which he lives as a peaceable, law-abiding man, or the contrary?"

83. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Martin Ray in the community in which he lives as a peaceable, law-abiding man, or the contrary?"

84. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you
59 know the general character of the defendant Will Mitchell as a peaceable, law-abiding man, or the contrary?"

85. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Allen Lights in the community in which he lives as a peaceable, law-abiding man, or the contrary?"

86. The court erred in refusing to allow the defendants' counsel to ask the witness Stout the following question: "Do you know the general character of the defendant Henry Simpson in the community in which he lives as a peaceable, law-abiding man, or the contrary?"

87. The court erred in refusing to allow the defendants' counsel to ask the witness Bogan what charge a warrant was asked for against Wm. Pruitt by J. W. Todd at the hands of said Bogan as a magistrate.

88. The court erred in allowing the assistant district attorney to ask the witness Bogan the following question: "You do not claim to say that Todd was not at the Bishop old house that night at ten o'clock?

89. The court erred in allowing the assistant district attorney to ask the following question of the witness Starling: Everybody seemed to be hostile about it? The witnes- had testified that after the arrest of Farmer, Kelly, and Arnold people seemed hostile about the arrest. To this the defendant- objected and reserved an exception and immediately thereafter the last-named question was asked t-e witness.

90. The court erred in refusing to allow the defendants' counsel to ask the witness Starling the following question: Were any of these men, meaning defendants, engaged in distilling or had they the reputation of being engaged in it?

91. The court erred in refusing to allow the defendants' counsel to ask the witness Starling the following question: You do
60 not know, then, that these men—you do not know the neighborhood was hostile? You do not — that these defendants were stirred up? This question referred to the feeling created by the arrest of Arnold, Kelley, and Farmer, if any.

92. The court erred in allowing counsel for the Government to ask the witness Leander Tucker the following question: Didn't the fact that the Pruitts reported Arnold, Kelley, and Farmer create a good deal of feeling against them in the neighborhood?

93. The court erred in refusing to allow the defendants' counsel to ask the witness R. S. Dixon the following question: Do you know the general character of Bill Pruitt for thei vishness?

94. The court erred in refusing to allow defendants' counsel to ask William Pruitt, Jr., whether he said in the latter part of March, 18-3, at Collinsville, that the innocent would have to suffer with the guilty in this matter?

95. The court erred in refusing to allow defendants' counsel to ask the witness Will Austin the following question: What relations existed between Todd and Bennerfield at that time? meaning the time of the conversation at Bennerfield's house on the night of December 23rd, 1892.

96. The court erred in allowing the counsel for the Gonernment to ask the witness W. L. Kitsinger the following question: Do you say that you have told no man about what you were going to testify?

97. The court erred in refusing to allow defendants' counsel to ask the witness W. D. Beck the following question: Did you have a conversation with him (Wesley Pruitt) on the way to Centre, about the middle of April, 1893, in which he stated to you that it was for the money there was in this matter they had gone into it and if it had not been for Daniels they would have made a good deal out of it?

61 98. The court erred in refusing to allow the defendants' counsel to ask the witness W. D. Beck the following question: Did you carry Wesley Pruitt to jail about the 1st of last April and did he say to you then between his house and Centre that he knew Mike Beck was not in the whipping, but he had had him arrested because the innocent would have to suffer with the guilty?

99. The court erred in allowing counsel for the Government to ask the witness James T. Bartlett the following question: Didn't Marion Copeland tell you at your house on Tuesday after the whipping of the Pruitts that John Sims told Marion Copeland that he, John Sims, Henry Stimpson, Will Sims, Mr. Rice, J. W. Todd, Henry Roberts, and Will Mitchell were going to meet that night at Hague's cross-roads and go and kill the Pruitts, Wiley and William?

100. The court erred in allowing counsel for the Government to ask the witness James T. Bartlett the following question: And didn't you tell him at the same time (referring to the time and conversation stated in the question of the next preceding assignment of error) that he was in enough trouble if this thing got out on him, and to take his wagon and mules and go down in the valley and haul a load of corn; that you didn't want him to be home when that thing occurred?

101. The court erred severally and separately in refusing to allow counsel for defendants to ask the witness Maggie Mitchell the following questions: Were you at Marion Copeland's on the night of the 4th of March, 1893? Do you know where Marion Copeland was on the night of the 4th of March, 1893? The witness had testified that she was the wife of Mitchell, defendant.

102. The court erred in refusing to allow defendants' counsel to ask

the witness George W. McGhee the following question: What
62 was the reputation of these defendants in that community as being temperance men, temperate and opposed to the making or selling of liquor?

103. The court erred severally and separately in refusing to allow counsel for defendants to ask George W. McGhee the following question: What was the reputation of these men (meaning defendants) as to whether they were favorable or opposed to illicit distilling? What was their reputation as prohibitionists?

104. The court erred in refusing to allow the introduction by defendants of the affidavit of W. L. Pruitt, made on the 6th day of March, 1893, before Commissioner Robert Charlson, in which affidavit said Pruitt swore Bartlett and others were present at the time of the alleged whipping.

105. The court erred in allowing the counsel for the Government to ask the witness Leander Copeland the following question: "Did he (meaning Marion Copeland) or not admit his guilt?"

106. The court erred in allowing the witness Leander Copeland to state that Marion Copeland, "When he came back he told me (witness) he was guilty."

107. The court erred in allowing counsel for the Government to ask the witness Leander Copeland the following question: "Did he (Marion Copeland) say who was with him?"

108. The court erred in refusing to exclude on motion of defendants' counsel the statement of the witness Leander Copeland that he (Marion Copeland) gave the names of those men (defendants) you have here and some that he, witness, never saw or heard of before.

109. The court erred in allowing the counsel for the Government to ask the witness Leander Copeland the following question: "Who else besides thes- that he named with him (Marion Cope-
63 land) at the time of the whipping?"

110. The court erred in allowing the counsel for the Government to ask the witness Leander Copeland the following question: "What did he (Marion Copeland) say about these other men who have been discharged?"

111. The court erred in allowing the counsel for the Government to ask the following question: "What did he (Marion Copeland) propose to do?"

112. The court erred in allowing the counsel for the Government to ask the witness Leander Copeland the following question: "All of this occurred before he (Marion Copeland) was under arrest?"

113. The court erred in admitting as testimony the answer of the witness Leander Copeland to the question set forth in the next preceding assignment of error, which answer was, "Yes, sir."

114. The court erred in allowing the counsel for the Government to ask the witness Leander Copeland the following question: "Did you take Taylor Brock to him (Marion Copeland) at his request?"

115. The court erred in allowing the counsel for the Government to ask the witness Leander Copeland the following question: "Did you ever talk to him (Marion Copeland) in my presence?"—meaning thereby in the presence of the district attorney.

116. The court erred in allowing the counsel for the Government to ask the witness Leander Copeland the following question: "You told him to tell the truth?"

117. The court erred in allowing the counsel for the Government to ask the witness Leander Copeland the following question: "What, if anything, did you always tell him about this matter?"

118. The court erred in allowing the counsel for the Government to ask the witness Leander Copeland the following question:
64 "Now, Mr. Copeland, what did I tell you in his presence in the district attorney's office before he pleaded guilty?"

119. The court erred severally and separately in allowing the counsel for the Government to ask the witness Leander Copeland the following questions: 1st. "Did you hear what he (Marion Copeland) said to Taylor Brock?" 2nd. "Did he (Marion Copeland) tell him the same thing as you?" 3rd. "What did Marion Copeland say to Taylor Brock about whether he (Marion Copeland) was guilty or not?" 4th. "What other names, if any, did he give with Taylor Brock? Did he say they were with him in the whipping or not?"

120. The court erred in refusing to grant the motion of the defendants' counsel to exclude what the witness John Tippins said as to the contents of the note written by Henry Roberts to said witness while said Roberts was in jail, said witness having testified that said Roberts wrote witness a note asking that witness testify in this cause that said Roberts was at witness's house and stayed all night on the night of the 4th of March, 1893. The witness had also testified the note was at his house now.

121. The court erred in allowing the counsel for the Government to ask the witness Jno. W. Tippins the following question: "You could not have gotten it in any other way?" This question referred to the answer of the witness Tippins that he understood that Henry Roberts was hiding out on the night of the 11th of March, 1893.

122. The court erred in allowing the Government's counsel to ask the witness Taylor Brock the following question: "Who showed you where he (Marion Copeland) was?"

123. The court erred in allowing the Government's counsel to ask the witness Taylor Brock the following question: "Did he (Marion Copeland) tell you what he proposed to do, if anything?"

65 124. The court erred in allowing the Government's counsel to ask the witness Taylor Brock the following questions: "Did he say who was guilty?" "What about these defendants, if any?" "State whether or not he helped whip the Pruitts with these men." "Did he or not name the innocent ones?"

125. The court erred in allowing the Government's counsel to ask the witness Jno. Zeigler the following question: "Did you have a talk with Jas. T. Bartlett while going from church to your house soon after the boys were arrested, in which he told that Todd and Hooper were the leaders of this concern, and that Hooper was the captain and Todd the manager of this whipping business?"

126. The court erred in allowing the counsel for the Government to ask the witness Jno. S. Milner the following question: "Mr. Milner, did Marion Copeland point out to you the place where they got these switches?"

127. The court erred in allowing the Government's counsel to ask the witness Marion Copeland the following question: Did you point out to them (meaning Milner, Daniels, and others) the pole you crossed that creek on?

128. The court erred in refusing to grant the motion of the defendants' counsel to exclude the statement of the witness Marion Copeland that he pointed out the pole that the creek was crossed on the night of the alleged whipping; that he took Milner and others and showed the pole to them and told them before he got there the side of the creek that the pole was cut on.

129. The court erred in allowing the introduction in evidence of the affidavit signed by D. M. Beck—D. M. Beck and Mike Beck being one and the same person.

66 130. The court erred in allowing the introduction in evidence of the affidavit signed Henry Roberts.

131. The court erred in allowing introduced in evidence the affidavit signed Mark Beck.

132. The court erred in allowing to be introduced in evidence an affidavit signed or purporting to be signed by Sam Simms.

133. The court erred in allowing to be introduced in evidence an affidavit signed or purporting to be signed by Henry Stimpson.

134. The court erred in its oral charge to the jury in charging them, among other things, as follows: "When there is an irreconcilable conflict of testimony as to any material matter in a cause, as when alibi is sought to be established for a defendant whose guilt the evidence for the prosecution tend*a* to establish more or less conclusively, and the defendant is shown by the evidence in the case to have the means of producing testimony to prove that he was elsewhere at the time the offense was committed, the failure to produce such evidence is a circumstance to be weighed against him."

135. The court erred in its oral charge to the jury in charging them, among other things, as follows: "It is insisted here on the part of the defense that even if the jury believe from the evidence that the defendants were of the band of men who assaulted the Pruitts on the night of the 4th of March last, that will not justify a verdict of guilty against them unless the jury further finds that the cause and motive for the assault and whipping was that charged in the indictment, and this — correct, but it is not questioned that this assault and whipping of the Pruitts on the night of the 4th of March last was lawless and wicked conduct, without justification or excuse under any law, human or divine, and the character

67 of this conduct is fair matter for the consideration of the jury in connection with the proof relied on to show that the whipping was in whole or in part for the specific cause charged in the indictment."

136. The court erred in its oral charge to the jury in charging

them, among other things, as follows: "Even if it appears from the evidence that some of the parties to the transaction of the night of the 4th of March, at the Pruitts' houses, were influenced in what they did and combined to do by motives other than charged in the indictment, such as general meanness or other alleged characteristics of the Pruitts; yet, if you find it as any part of the purpose and motive of the conspiracy to assault and whip the Pruitts on account of their having testified in the case of the United States against Kelley, Arnold, and Farmer, that is sufficient to fix and establish the jurisdiction of the court."

137. The court erred in its oral charge to the jury in charging them, among other things, as follows: "If there was probable cause to believe that these defendants had violated the laws of the United States and were proceeded against under the forms of the law, then there is no cause for complaint, and no complaint will be heard that they are brought to trial here in this court and not in the State courts of Cleburne county.

138. The court erred in its oral charge to the jury in charging them, among other things, as follows: "If you are satisfied from the evidence in this case, beyond reasonable doubt, that William and Wiley Pruitt were assaulted by a band of disguised men who had conspired and agreed to do it and actually carried it out, and this was done, as charged, on account of the fact that they (the two Pruitts) had testified in an examining court held by one Robert Charlson, an acting United States commissioner, *and* that the defendants were parties to and participated in the whipping, then your verdict must be guilty."

68 139. The court erred in refusing to give the jury, at the request of the defendants, the following charge, which charge was presented in writing: The court charges the jury, if the jury believe all the evidence in the case, they will find the defendants not guilty.

140. The court erred in refusing to give the jury, at the request of the defendants, the following charge, which charge was presented in writing: "The court charges the jury, if the jury believe from the evidence that the Pruitts were whipped for their thievishness and killing people's stock, they must acquit. If the jury believe the testimony of Marion Copeland they must acquit the defendants."

141. The court erred in refusing to give the jury, at the request of defendants, the following charge, which charge was presented in writing: Defendants ask this charge: If the jury believe from the evidence that any witness had sworn falsely in one material particular the jury may disbelieve such witness entirely.

The court erred in refusing to give the jury, at the request of defendants, the following charge, which charge was presented in writing:

The defendants ask this charge: If the jury believe the testimony of the Government witnesses unworthy of credit they must acquit the defendants.

142. The court erred in refusing to give the jury, at the request

of defendants, the following charge, which charge was presented in writing: "Defendants ask this charge: If the jury believe from the testimony of Marion Copeland's wife that — Pruitts were whipped on account of their thievishness and cutting people's stock, then defendants cannot be convicted.

143. The court erred in refusing to give the jury, at the request of defendants, the following charge, which charge was presented in writing: The court charges the jury: If from the evidence
69 the jury have a reasonable doubt whether either of defendants did assault, beat, bruise, or wound with weapons Wiley and William Pruitt on account of their having testified before Commissioner Charlson against Arnold, Turner, and Kelley, they must acquit such defendants.

144. The court erred in refusing to give the jury, at the request of defendants, the following charge, which charge was presented in writing: The court charges the jury that if, from the evidence, the jury have a reasonable doubt whether either of the defendants did combine, conspire, and confederate together by force and intimidation and threats to injure Wiley Pruitt and William Pruitt on account of their having testified as witnesses in a cause tried before Charlson as commissioner, then such defendants must be acquitted.

145. The court erred in refusing to give the jury, at the request of defendants, the following charge, which charge was presented in writing: The court charges the jury that in the indictment under which defendants are tried the- are charged with a conspiracy, by force and intimidation and threats, to injure Wiley and William Pruitt on account of having been witnesses before Commissioner Charlson against Arnold, Farmer, and Kelley. Now, if the jury have a reasonable doubt from the evidence whether the conspiracy was to whip them on account of their thievishness, cutting up people's stock, or threatening to burn barns and churches, the jury must acquit the defendants.

146. The court erred in refusing to give the jury, at the request of defendants, the following charge, which charge was presented in writing: Defendants ask the court to charge the jury, if the jury believe from the evidence that the Pruitts were whipped on account of their thievishness and cutting people's stock, then they must find the defendants not guilty.

70 147. The court erred in refusing to give the jury, at the request of defendants, the following charge, which charge was presented in writing: Defendants ask the court to charge the jury: If the jury have a reasonable doubt whether the Pruitts were whipped, if they were whipped, on account of their thievishness, cutting people's stock, or threatening to burn houses, or whether they were whipped for testifying against Arnold, Kelley, and Farmer, they must give defendants the benefit of the doubt and acquit them.

148. The court erred in refusing to give the jury, at the request of the defendants, the following charge, which charge was presented in writing: The court charges the jury that if they believe from the evidence in this case that the Government has proven by its own

witnesses that the conspiracy, if any was made by the defendants, was to punish the Pruitts for their theivishness and cutting people's stock or for threatening to burn people's houses, then the Government is bound by said proof and defendants cannot be convicted of the conspiracy charged in the indictment.

149. The court erred in refusing to give the jury, at the request of defendants, the following charge, which charge was presented in writing: "If the jury find from the evidence that a witness has spoken an untruth as to one matter while testifying, they may disregard his or her testimony as to all matters."

150. The court erred in refusing to give the jury, at the request of defendants, the following charge, which charge was presented in writing: "If the jury find from the evidence that a witness has made one statement at one time and a different statement at another time touching the same matter, this leaves the truthfulness of both statements in doubt, and the jury may reject both statements"

71 151. The court erred in refusing to give the jury, at the request of defendants, the following charge, which charge was presented in writing: "The court charges the jury that it is not sufficient to authorize a conviction in this case that the jury should believe from the evidence that a conspiracy was entered into by defendants; but if they believe from the evidence that an unlawful conspiracy was entered into by defendants, then they must prosecute the enquiry further, and before a conviction can be had they must believe from the evidence, to a moral certainty, that such conspiracy was for the specific reason and purpose charged in the indictment, to wit, to injure Wiley and William Pruitt because they had been witnesses against Farmer, Kelley, and Arnold in a charge of intimidation before Commissioner Charlson; and if the jury have a reasonable doubt as to whether the conspiracy, if any is proven, was for the reason of the theivishness and general meanness of the Pruitts or any other cause than that charged in the indictment, the jury will give the defendants the benefit of the doubt and acquit."

152. The court erred in refusing to give the jury, at the request of the defendants, the following charge, which charge was presented in writing: "Defendants ask this charge: Before the defendants can be convicted the jury must believe beyond a reasonable doubt that they conspired together by force and intimidation and threats to injure the Pruitts because said Pruitts had testified against Arnold, Farmer and Kelley, and if they have a reasonable doubt this being the reason of the conspiracy they must acquit the defendants."

153. The court erred in refusing to give the jury, at the request of defendants, the following charge, which charge was presented in writing. Defendants ask this charge: "When the Government put Marion Copeland, Marion's wife, and Jerome Copeland on

72 the stand, it vouched for their credibility; and if the jury believe from this evidence, in connection with other evidence, that the Pruitts were whipped, if they were whipped, on account of their theivishness and cutting of people's stock, then the jury will return a verdict of not guilty."

154. The court erred in refusing to grant the motion of the defendants in arrest of judgment as to each ground of said motion severally and separately. Wherefore these defendants pray that these errors be passed on by the Supreme Court of the United States, and that this cause be reversed, or that such judgment may be entered as is by law required.

(S'g'd) DENSON & BARNETT,
W. H. SMITH AND J. J. ALTMAN,
Att'ys for Defendants.

Endorsed: Filed September 2nd, 1893. (S'g'd) N. W. Trimble, clerk.

73 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the northern district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between The United States of America and J. W. Todd, Allen Lights, George Simms, Sam. Sims, John Sims, Henry Roberts, Will Mitchell, Jack Beck alias E. J. Beck, Mark Beck, Morris Ray, Will Sims, and Will Hooper and H. B. Stimpson, a manifest error hath happened, to the great damage of the said J. W. Todd, Allen Lights, George Sims, Sam. Sims, John Sims, H. B. Stimpson, Henry Roberts, Will Mitchell, Jack Beck alias E. J. Beck, Mark Beck, Morris Ray, Will Sims, and Will Hooper, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the partes aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 7th day of September, in the year of our Lord one thousand eight hundred and ninety-three.

Seal District Court U. S., N. D. of Ala., Sou. Div.

N. W. TRIMBLE,
Clerk of the Dist. Court of the United States, Northern Dist. Ala.

Allowed by—
JOHN BRUCE, *Judge.*

74 I, N. W. Trimble, clerk of the district court of the United States for the southern division of the northern district of Alabama, hereby certify the foregoing pages, numbered from one to seventy-four, inclusive, to be a true and correct transcript of the record and proceedings touching the appeal in a certain criminal cause lately pending in said district court between The United States and J. W. Todd alias Watson Todd *et als.* as the same now appears of record and on file in my office.

Seal District Court U. S., N. D. of Ala., Sou. Div.

In witness whereof I hereunto subscribe my name and cause the seal of the said district court to be affixed this the 25th day of July, A. D. 1894.

N. W. TRIMBLE,
Clerk U. S. Dist. Court, Nor. Dist. Ala., Sou. Div.

[Endorsed:] No. —. U. S. Supreme Court. J. W. Todd alias Watson Todd *et als.*, plaintiffs in error, *vs.* The United States, defendant in error. Writ of error & transcript of record and proceedings from U. S. district court for southern division of northern district of Alabama.

Endorsed on cover: Case No. 15,706. N. Alabama D. C. U. S. Term No., 822. J. W. Todd, Allen Lights, George Simms, *et al.*, pl'ffs in error, *vs.* The United States. Filed October 13, 1894.

158-2
158-278

FILED.
MAR 14 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

J. W. TODD, ALLEN LIGHTS, GEORGE SIMMS, AND TEN OTHERS,
PLAINTIFFS IN ERROR,

v.

THE UNITED STATES,
DEFENDANT IN ERROR.

No. 822.

In Error to the District Court of the United States for the Northern District of Alabama (Todd, Lights, Simms, and others).

BRIEF FOR THE PLAINTIFFS IN ERROR.

JOHN C. FAY,
WM. H. DENSON,
J. L. BURNETT,
Attorneys for Plaintiffs in Error.

WASHINGTON, D. C.:
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1895.

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No. 822.

In Error to the District Court of the United States for the Northern District of Alabama (Todd, Lights, Simms, and Others).

Brief for the Plaintiffs in Error.

STATEMENT OF THE CASE.

The plaintiffs in error, with fourteen others, were indicted in the United States district court for the northern district of Alabama under section 5406 of the Revised Statutes, charged with "unlawfully, corruptly, forcibly, and feloniously" combining, conspiring, and confederating together by force, intimidation, and threats to injure

Wiley and William Pruett, who had theretofore been witnesses and had testified against Joe Arnold, Milton Farmer, and George Kelley, tried preliminarily by and before Robert Charlson, *acting* as a commissioner of the circuit court of the United States for said district, upon a charge of endeavoring to influence, intimidate, and impede witnesses in a court of the United States, in violation of the criminal laws of the United States, in their person and property, on account of the said witnesses above named having testified in said cause in the said court as aforesaid. The overt act set out in the indictment is, " and in pursuance of said conspiracy, and to effect the object thereof, the said defendants and each of them did assault, beat, bruise, and wound with weapons the said Pruetts, contrary," &c.

A *nolle prosequi* was entered as to eleven of the defendants (Record, p. 3), and one pleaded guilty (Record, p. 3), and was used as a Government witness, and two were not tried.

The case was tried by a jury, at an adjourned term of the district court, and the plaintiffs in error were convicted, and have been sentenced to undergo imprisonment at hard labor in the penitentiary in the Minnesota state-prison, at Stillwater, in the State of Minnesota, for the term of four years, and to pay a fine of five hundred dollars and costs.

To this indictment a demurrer was interposed, the grounds of which are set out on page 2 of the record. This was overruled, and, after verdict, a motion in arrest of judgment was made, as set out on page 5 of the record. This was also refused, and the case is now before this court upon the questions raised in the demurrer, page 2, the motion in arrest of judgment, pages 5 and 26, and a bill of exceptions, reserved at the trial, pages 7 to 26.

The petition for a writ of error, pages 29 to 44, inclusive, contains 154 separate assignments of error.

Assignments of Error.

The errors relied on may be classified into (1), errors relating to the form and sufficiency of the indictment; (2) as to the empaneling of the jury; (3) as to the instructions of the court, and (4) as to the admission and exclusion of evidence.

First. Form and Sufficiency of Indictment.

The court erred in overruling the demurrer to the indictment and refusing to arrest the judgment. (Record, pp, 2, 5.)

Because the indictment does not charge—

(*a*) that the defendants had any knowledge that the parties who it alleges they conspired to injure had ever been witnesses in any court of the United States;

(*b*) that it fails to charge that witnesses had testified fully, freely, and truthfully;

(*c*) that it fails to charge that Robert Charlson, *acting* as commissioner, had any lawful authority to so act, and there is no such office known to the law as an *acting* commissioner of the circuit court;

(*d*) the indictment does not charge specifically, and otherwise than by inference, that the conspiracy was formed to injure the witnesses because they had testified in any court of the United States, nor does it charge that the prosecuting witnesses had testified fully, freely, and truthfully.

Second. As to the Empaneling of the Jury.

(*a*) The court erred in restricting the defendants to three challenges, in lieu of allowing ten, as provided by

section 810 of the Revised Statutes, and overruling their peremptory challenge to the Juror McCullough, they having, at that time, only used three peremptory challenges. (Record, p. 8.)

(*b*) And in allowing the challenge for cause to the district attorney as to the Juror Douglass, and discharging him as a juror, the answers of the juror, set out in the bill of exceptions, being insufficient to show such a bias as to render him incompetent. (Record, p. 7.)

THIRD. AS TO INSTRUCTIONS OF THE COURT AND REFUSAL OF DEFENDANTS' PRAYERS.

The learned judge below erred in giving the following instructions:

(*a*) "When there is an irreconcilable conflict of testimony as to any material matter in a cause, as when an alibi is sought to be established for a defendant whose guilt the evidence for the prosecution tends to establish more or less conclusively, and the defendant is shown by the evidence in the cause to have the means of producing testimony to prove that he was elsewhere at the time the offence was committed, and having attempted to prove such alibi, the failure to produce such evidence is a circumstance to be weighed against him." (Record, p. 21.)

(*b*) "It is here insisted on the part of the defence that even if the jury believe from the evidence that the defendants were of the band of men who assaulted the Pruetts on the night of the 4th of March last that will not justify a verdict of guilty against them unless the jury further finds that the cause and motive for the assault and whipping was that charged in the indictment. This is correct, but it is not questioned that this assault and whipping of the Pruetts on the night of the 4th of March last was lawless and wicked conduct, without justification or excuse under any law, human or divine, and the character of this conduct is fair matter for the consideration of the jury in

connection with the proof relied on to show that the whipping was in whole or in part for the specific cause charged in the indictment." (Record, p. 21.)

(*c*) "Even if it appears from the evidence that some of the parties to the transaction of the night of the 4th of March last at the Pruett's houses were influenced in what they did and combined to do by motives other than charged in the indictment, such as general meanness or other alleged characteristics of the Pruetts, yet if you find it was any part of the purpose and motive of the conspirators to assault and whip the Pruetts on account of their having testified in the case of the United States against Kelley, Arnold, and Farmer, that is sufficient to fix and establish the jurisdiction of the court." (Record, p. 22.)

(*d*) "If there was probable cause to believe these defendants had violated the laws of the United States and were proceeded against under the forms of the law, then there is no cause for complaint and no complaint will be heard that they are brought to trial here in this court and not in the State courts of Cherokee county." (Record, p. 22.)

(*e*) "If you are satisfied from the evidence in this case, beyond reasonable doubt, that William and Wiley Pruett were assaulted by a band of disguised men, who had conspired and agreed to do it and actually carried it out, and this was done, as charged, on account of the fact that they (the two Pruetts) had testified in an examining court held by one Robert Charlson, an acting United States commissioner, and that the defendants were parties to and participated in the whipping, then your verdict must be guilty."

THE COURT ERRED IN REFUSING TO CHARGE THE JURY, AT THE REQUEST OF THE DEFENDANTS, as follows:

(*f*) "The court charges the jury, if the jury believe all the evidence in the case, they will find the defendants not guilty." (Record, p. 22.)

(*g*) "The court charges the jury, if the jury believe from the evidence that the Pruetts were whipped for their thievishness and killing people's stock, they must acquit. If

the jury believe the testimony of Marion Copeland, they must acquit the defendants." (Record, p. 23.)

(*h*) "If the jury believe from the evidence that any witness has sworn falsely in one material particular, the jury may disbelieve such witness entirely." (Record, pp. 22–23.)

(*j*) "If the jury believe the testimony of the Government witnesses unworthy of credit, they must acquit the defendants." (Record, p. 23.)

k) "If the jury believe from the testimony of Marion Copeland and wife that the Pruetts were whipped on account of their thievishness and killing people's stock, then defendants cannot be convicted." (Record, p. 23.)

(*l*) "If from the evidence the jury have a reasonable doubt whether either of defendants did assault, beat, bruise, or wound with weapons Wiley and William Pruett on account of their having testified before Commissioner Charlson against Arnold, Farmer, and Kelley, they must acquit such defendants." (Record, p. 23.)

(*m*) "The court charges the jury that if from the evidence the jury have a reasonable doubt whether either of the defendants did combine, conspire, and confederate together by force and intimidation and threats to injure Wiley Pruett and William Pruett on account of their having testified as witnesses in a cause tried before Charlson, as commissioner, then such defendants must be acquitted." (Record, p. 23.)

(*n*) "The court charges the jury that in the indictment under which the defendants are tried they are charged with a conspiracy, by force and intimidation and threats, to injure Wiley and William Pruett on account of having been witnesses before Commissioner Charlson against Arnold, Farmer, and Kelley. Now, if the jury have a reasonable doubt from the evidence whether the conspiracy was to whip them on account of their thievishness, cutting up people's stock, or threatening to burn barns and churches, the jury must acquit the defendants." (Record, pp. 23, 24.)

(*o*) "If the jury find from the evidence that a witness has made one statement at one time and a different statement at another time, touching the same matter, this

leaves the truthfulness of both statements in doubt, and the jury may reject both statements." (Record, p. 24.)

(*p*) "If the jury believe from the evidence that the Pruetts were whipped on account of their thievishness and cutting people's stock, then they must find the defendants not guilty." (Record, p. 24.)

(*q*) "If the jury have a reasonable doubt whether the Pruetts were whipped, if they were whipped, on account of their thievishness, cutting people's stock, or threatening to burn houses, or whether they were whipped for testifying against Arnold, Kelley, and Farmer, they must give defendants the benefit of the doubt and acquit them." (Record, p. 24.)

(*r*) "The court charges the jury that if they believe from the evidence in this case that the Government has proven by its own witnesses that the conspiracy, if any was made by the defendants, was to punish the Pruetts for their thievishness and cutting people's stock, or for threatening to burn people's houses, then the Government is bound by said proof, and defendants cannot be convicted of the conspiracy charged in the indictment." (Record, p. 24.)

(*s*) "If the jury find from the evidence that a witness has spoken an untruth as to one matter while testifying, they may disregard his or her testimony as to all matters." (Record, p. 24.)

(*t*) "The court charges the jury that it is not sufficient to authorize a conviction in this case that the jury should believe from the evidence that a conspiracy was entered into by defendants, but if they believe from the evidence that an unlawful conspiracy was entered into by the defendants, then they must prosecute the enquiry further, and before a conviction can be had they must believe from the evidence, to a moral certainty, that such conspiracy was for the specific reason and purpose charged in the indictment, to wit, to injure Wiley and William Pruett because they had been witnesses against Farmer, Kelley, and Arnold in a charge of intimidation before Commissioner Charlson; and if the jury have a reasonable doubt as to whether the conspiracy, if any is proven, was for the

reason of the thievishness and general meanness of the Pruetts, or any cause than that charged in the indictment, the jury will give the defendants the benefit of the doubt and acquit." (Record, p. 25.)

(*u*) "Before the defendants can be convicted the jury must believe beyond a reasonable doubt that they conspired together, by force and intimidation and threats, to injure the Pruetts because said Pruetts had testified against Arnold, Farmer, and Kelley, and if they have a reasonable doubt about this being the reason of the conspiracy, they must acquit the defendants." (Record, p. 26.)

(*v*) "When the Government put Marion Copeland, Marion's wife, and Jerome Copeland on the stand it vouched for their credibility, and if the jury believe from their evidence, in connection with the other evidence, that the Pruetts were whipped, if they were whipped, on account of their thievishness and cutting of people's stock, then the jury will return a verdict of not guilty. (Record, p. 26.)

FOURTH. AS TO ADMISSION AND EXCLUSION OF EVIDENCE.

(*a*) The court should have limited the statements of Todd, Roberts, and Mitchell, made after they had started home, and while the others were behind, to the parties making them. (Record, p. 12.)

Logan v. *U. S.*, 144 U. S. 264, and authorities cited.

(*b*) The court should not have stated that the commissioner might have made a mistake in taking down Wisley Pruett's evidence previously. It was introduced after laying the predicate to impeach Pruett, and the judge's remark was calculated to destroy that effect. (Record, p. 13.)

(*c*) Wiley Pruett's statement that as he came from the whipping he wanted to stop at home was only the expres-

sion of an uncommunicated desire or purpose, and was inadmissible. (Record, pp. 11, 12.)

(*d*) Defendants should have been permitted to ask Wiley Pruett if he did not testify positively before the grand jury to twenty-seven men being in the crowd. This was one way of laying a predicate for his impeachment. (Record, p. 12.)

(*e*) Marion Copeland had "turned state's evidence," and had stated that defendants whipped Pruetts for their viciousness, among other things, and his testimony as to whether he had heard them accused of stealing was relevant in that aspect of the case. (Record, p. 14.)

(*f*) All the questions and answers of Marion Copeland asked by Government counsel, on pages 16 and 17 of Record, were illegal in every aspect. It permitted the expression of secret purposes, and the deception he practised on defendants as to what he was going to Birmingham for, and they were altogether irrelevant. (Record, pp. 16 and 17.)

(*g*) Defendants should have been permitted to introduce the affidavit of William Pruett made before Commissioner Charlson at the beginning of the case. In said affidavit he swore that Bartlett and Johnson were present at the whipping. On this trial he denied it. Even unsworn statements are admissible for the purpose of impeaching a witness. Then for how much greater reason should sworn statements be admitted. (Record, p. 21.)

(*h*) The court permitted Leander Copeland, the father of Marion Copeland, to testify to conversations he had with Marion while the others were not present. These were as to what he said about his own guilt, who were with him, &c., and could serve no purpose except to corroborate his present statements by proof that he had previously made the same statement. All the authorities

hold that this cannot be done as to a mere witness. (Record, pp. 18, 19.)

Greene v. *The State*, 96 Ala. 29.

(*j*) The Government counsel was permitted to introduce the statements made in the affidavits of D. M. Beck, Henry Roberts, Sam Sims, and Henry Stimpson on their application for witnesses. These were as to declarations made therein which the witnesses on the stand swore were not true. Defendants had not introduced these affidavits nor had they themselves testified. Then certainly no predicate had been laid for the introduction of these documents. It was an effort to discredit the defendants when they had not been witnesses. (Record, pp. 19, 20.)

(*k*) In refusing to allow the defendants below to show that they were not engaged in distilling, had no connection with distilleries, and had not the reputation of being so engaged, and to show that their reputation was that of temperance men and opposed to the making and selling of liquor as set out in the 90th and 102d assignments of errors, pages 36 and 37, said evidence being clearly admissible to exculpate them from any hostile feeling towards the prosecuting witnesses that existed in the community against them by reassn of said prosecuting witnesses having reported illicit distilleries, evidence of which was admitted on the part of the prosecution, and to show that the plaintiffs in error (defendants below) could not have been engaged in the whipping of the prosecuting witnesses on account of their testimony in the case charged in the indictment, said case growing out of the said illicit distilleries on account of the prosecuting witnesses having been witnesses in the said cause. (Record, p. 18.)

These questions will not be further argued or elabo-

rated in the brief; they, however, are not abandoned, but submitted without additional comment.

ARGUMENT.

First. Defects in Indictment.

(*a*) It nowhere appears, except, possibly, by inference, that plaintiffs in error *knew* that the Pruetts had testified in a United States court, and this we insist is a fatal omission in the indictment, both in order to create a Federal offence as well as to charge the defendants with any offence. In the case of Pettibone *v.* United States (148 U. S. 197) the court held that such an indictment must charge the accused with knowledge or notice that the witness was such. In the case at bar no such notice or knowledge is alleged, and the case cited *supra* seems conclusive. The same doctrine is stated in State *v.* Carpenter (54 Vt. 551) and State *v.* Stuart (59 Vt. 273). See, also, Ker *v.* U. S. (39 Fed. Rep. 603). It is not sufficient in this case to set out the offence simply in the words of the statute; guilty knowledge is a necessary element of the offence. (U. S. *v.* Carl, 105 U. S. 612.)

(*b*) This offence being purely a statutory one, every element mentioned in the statute going to make up the crime must, of necessity, appear in the indictment. Sec. 5406 denounces this conspiracy as a Federal crime when its purpose is to deter a witness "from attending such court or from testifying to any matter * * * freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified;" that is to say, freely, fully, and truthfully. These material allegations are entirely wanting, and unless it is to be assumed that Congress intended to protect *perjury*, they

must be held to be a necessary ingredient of the crime. There is no presumption of truth in the witness's favor; the presumption is in favor of the innocence of the accused, and inferentially against the witness. In this instance the pleader did not even follow the language of the statute. This omission is fatal to the indictment.

Cruikshank *v.* U. S., 92 U. S. 542.
U. S. *v.* Mills, 32 U. S. 138.

(*c*) The indictment charges that the Pruetts were witnesses before Robert Charlson, *acting* as a commissioner of the circuit court of the United States. Whether he was an officer *de jure* does not appear; that he was properly appointed, commissioned, or sworn, or lawfully acting is not charged. As the statutes of the United States do not provide for *an acting* commissioner, his lawful authority to so act cannot be presumed.

(*d*) The argument on subhead "*a*" is applicable to this.

SECOND.—EMPANELING THE JURY.

(*a*) The plaintiffs in error insist that the learned judge below erred in restricting them to three challenges instead of allowing them 10, and in allowing the juror McCulloch to sit after having been peremptorily challenged by defence in the attempted exercise of their fourth challenge. (Record, p. 8.)

It is insisted that by the true intent of this section an infamous crime, punishable with imprisonment in the penitentiary (R. S. 5542) at hard labor for six years and a fine of $5,000, is of that class of offences which entitles the defendant to *ten* instead of *three* peremptory challenges, and clearly comes within the term "any other felony" rather than "other cases, civil and criminal," mentioned in the statute.

Sec. 819 R. S. fixes the number of peremptory challenges, viz: for "treason or a capital offence," to the U. S. 5, the defendant 20; "on the trial of any other felony," to the U. S. 3, the defendant 10; "and in all other cases, civil and criminal, each party shall be entitled to 3 peremptory challenges."

It is very clear that Congress did not use the word "felony" in its original signification—*i. e.*, to describe an offence which, on conviction, carried with it the forfeiture of goods, for sec. 5326 R. S. expressly provides that *no conviction* in any case shall work "*any* forfeiture of estate."

We must look elsewhere for a definition of that word.

We submit that the word "felony" in this section is synonymous with "infamous crime;" and such is the reasoning of Mr. Justice Gray in *Ex parte* Wilson (114 U. S., at p. 423).

That a crime punishable by imprisonment at hard labor in the penitentiary is an infamous crime is finally settled in this court. (*Ex parte* Wilson, 114 U. S., 429; U. S. *v.* Petit, 114 U. S. 429; Macklin *v.* U. S., 117 U. S. 348; *Ex parte* Bain, 121 U. S. 13; *In re* Claussen, 144 U. S. 205). A felony is certainly an infamous crime (U. S. *v.* Wynne, 9 Fed. Rep. 886), and we insist that the converse of the proposition, in the light of current legislation, ought to be equally true. In many cases it is not easy to distinguish what are felonies and what *crimen falsi* (Harrison *v.* State, 55 Ala. 239), but the trend of the later decisions define "felony" as this court has defined "infamous crimes."

Johnson *v.* State, 7 Mo. 183.
Ingram *v.* State, 7 Mo. 293.
People *v.* War, 20 Cal. 117.
Miller *v.* State, 58 Ga. 200.

State *v.* Smith, 8 Blackf. 489.
7 Blackf. 186.
12 Meyer's Fed. Digest, sec. 3005.
Burrill's Law Dict., Felony.

The particular crime under consideration is one not only infamous in character, as a crime against justice, infamous as to punishment, but it carries with it not only an enormous fine, but a civil action for damages against these defendants, is also provided for by section 1980, Rev. Stat., so that if their estate is not forfeited in terms, the means to deprive them of it are amply provided. It is inconceivable, in view of the grave consequences resultant to a defendant from a conviction, that Congress intended the number of challenges awarded him should be the same as allowed in an ordinary civil contest over the possession of a horse or a cow, and a doubt, if one exists, should be awarded in favor of liberty and against the State.

(*b*) There was no sufficient cause for sustaining the Government's challenge to Juror Douglass.

He was not shown to be disqualified (Record, p. 8). T. & M. on Juries, p. 173 *et seq.*

Defendants were also entitled to a full panel before being required to pass on them.

Third. Instructions of Court.

The exceptions to the charge of the court and to its refusal to grant the prayers of the plaintiffs in error (Record, pp. 21–25) violate, we contend, the established rules of law governing the questions of—

The presumption of innocence;
The doctrine of reasonable doubt:
The doctrine of "*falsus in unum.*"

(*a*) The first instruction (Record, p. 21) directed the jury in substance that, in a conflict of evidence over an alibi, the failure of the accused to make the alibi good is to be weighed as a circumstance against him. That charge certainly does violence to that presumption of innocence which accompanies a defendant throughout his trial. The court erroneously, by this charge, gave great and undue prominence to this part of the defence, and indicated to the jury that the defendants had failed to make out the alibi, and that, too, after conceding that there was irreconcilable evidence on that subject.

Albritton *v.* State, 94 Ala. 76.

Miller *v.* People, 39 Ill. 466.

(*b*) The second charge of the court was equally erroneous (Record, p. 21). This made the whipping itself a circumstance to be considered by the jury as tending to show why it was done. This is a *reductio ad absurdum.*

(*c*) The third charge, on page 22, is equally erroneous. It tells the jury, "*if you find it* was any part of the purpose or motive of the conspirators," &c., without stating that they must find *it from the evidence,* and beyond reasonable doubt.

(*d*) The fourth charge, Record, p. 22, seems to fix as the quantum of proof in a criminal prosecution "probable cause," completely ignoring not only the doctrine of the presumption of innocence, but of the requirement of proof *beyond reasonable doubt.*

(*e*) The fifth charge, Record, p. 22, makes these defendants guilty of conspiracy, even though they never conspired, though they did not know of the motive for it and did not acquiesce in it; but if others had so conspired, and for the reasons set out in the indictment, these plaintiffs in error, without any guilty knowledge of any conspiracy

or of its motives, must be found guilty if they participated in the whipping. This, we submit, is clearly error.

The accused asked this court to charge the jury in relation to the cause for the whipping, in several forms, all of which prayers were refused.

The 2d (*g*), 5th (*k*), 9th (*o*), 11th (*p*), 16th (*v*) prayers ask the court to instruct the jury, if they believe from the evidence of certain specified Government witnesses or from the whole case that the Pruetts were whipped on account of their thievishness, meanness, cutting people's stock, they cannot be convicted.

These several prayers give the law correctly, and certainly there could have been no infringement of any Federal law by a simple assault and battery in the State of Alabama, induced alone by the general bad character of the parties assaulted, the assumption of a jurisdiction of that kind by the U. S. district courts would load an immense amount of police-court business upon the docket of this court.

The 15th (*u*), 14th (*t*), 10th (*p*), 8th (*n*), 7th (*m*), and 6th (*l*) prayers all ask the court to charge that the Government's proof must satisfy the jury beyond reasonable doubt of every essential element of the statutory crime. Each and all of these prayers were rejected. It is confidently submitted that the rule is correctly laid down, and even less strongly than it might correctly have been.

The 3d (*h*), 4th (*j*), 12th (*r*), 13th (*s*) prayers ask the court to instruct the jury as to the degree of credit that shall be attached to a self-contradicted witness or one that has sworn falsely in one particular.

Tested by the rule laid down in the Santisima Trinidad case (7 Wheat. 283), the instructions prayed for, fall far short of what might have been properly asked.

The plaintiffs in error respectfully submit that the judgment of the court below should be reversed.

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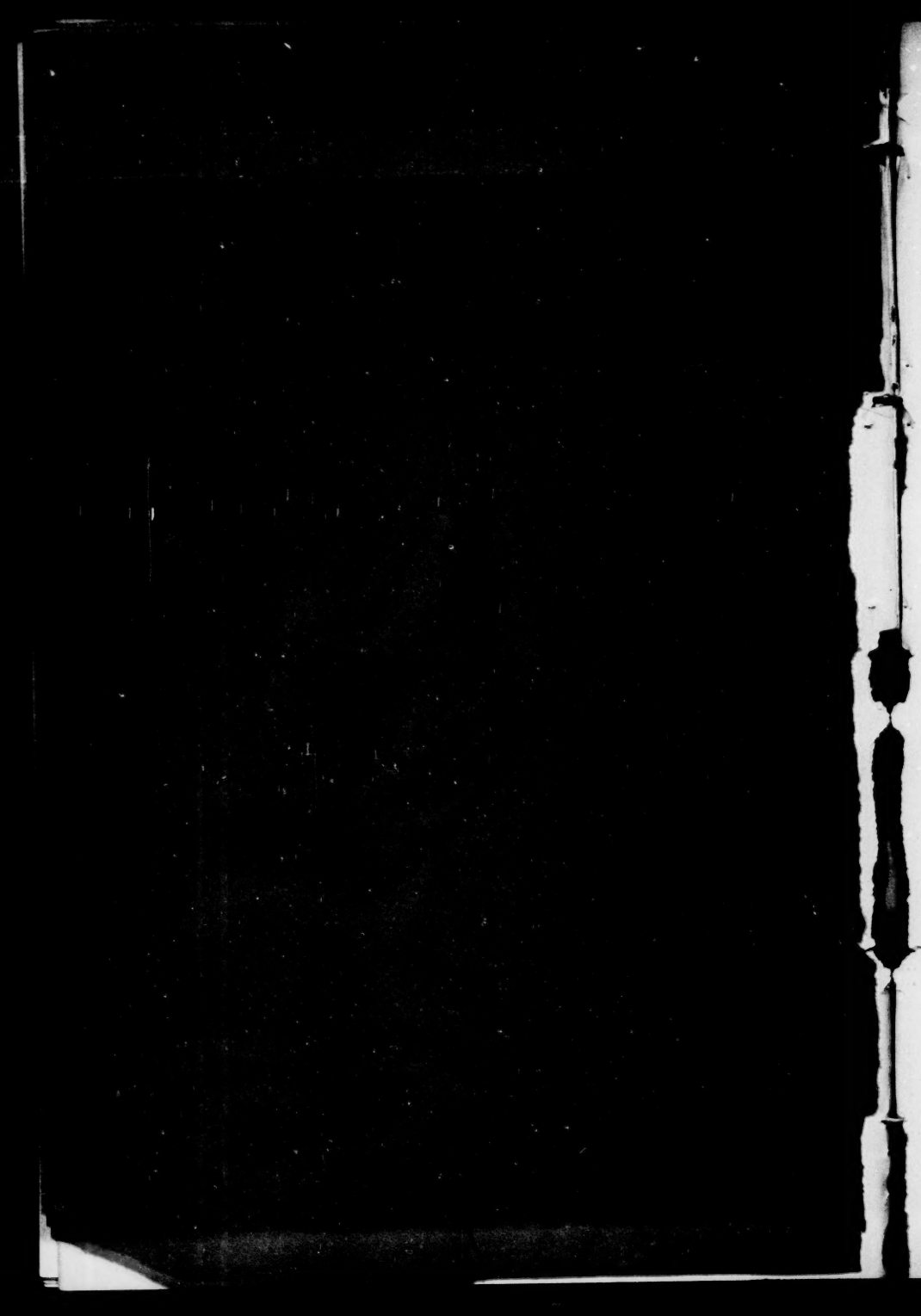
Attorneys for Plaintiffs in Error.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

J. W. TODD ET AL.

v.

THE UNITED STATES.

No. 822.

May a Commissioner of a Circuit Court of the United States when holding a preliminary examination be regarded as a Court of the United States within the meaning of Section 5406 of the Revised Statutes?

BRIEF FOR PLAINTIFFS IN ERROR.

The language of sec. 5406 is as follows:

"If two or more persons conspire to deter, by force, intimidation, or threat, any party or witness in ANY COURT OF THE UNITED STATES from attending such court, or from testifying to any matter pending therein," etc., etc., they shall be subject to the punishment therein prescribed.

By the Constitution it is provided that—

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as may

from time to time be established. The judges of both the supreme and inferior courts shall hold their offices during good behavior, and shall, at stated intervals, receive for their services a compensation which shall not be diminished during their continuance in office."

A commissioner of the circuit court derives his authority from section 627 of the Revised Statutes, as follows:

"Each circuit court may appoint in different parts of the district for which it is held so many discreet persons as it may deem necessary, who shall be called 'commissioners of the circuit courts,' and shall exercise the powers which are or may be EXPRESSLY conferred by law upon commissioners of circuit courts."

The powers which are expressly conferred upon commissioners of the circuit court with respect to their exercising the duties of an examining and committing magistrate are found in sections 1014 and 1982 of the Revised Statutes.

Section 1014 provides that for any crime against the United States the offender may, by any commissioner of the circuit court *to take bail*, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence; the same power is also conferred by the same section upon any justice or judge of the United States or any chancellor, judge of a supreme court or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate of any State.

Section 1982 confers upon district attorneys, marshals, and deputy marshals, as well as every other officer especially empowered by the President, the same power that it confers upon commissioners of the circuit court.

The mention of these other officers, upon whom is con-

ferred by both these sections like power with a commissioner of the circuit court, dispels the idea that a commissioner, when acting under their authority, is a court of the United States.

A commissioner is certainly not an inferior court within the meaning of the Constitution. That instrument especially provides that the judges of all such courts must hold their offices during good behavior and receive a compensation that cannot be diminished during their continuance in office—a condition that is utterly inapplicable to a judicial officer who receives fees as his compensation, and such a court is the only one Congress can create in a State. We do not overlook the decision of this court in American Insurance Company *v.* Canter (1 Peters, 511), where it was held that Congress might create legislative courts under the war powers of the Constitution; but that, certainly, has no applicability to the creation of a court in the State of Alabama, even though it might properly do so in one of the Territories of the United States.

The fact that Congress could not constitute a commissioner of a circuit court a court of the United States is well illustrated in the argument of Richard H. Dana, Jr., in the case of Thomas Sims (7 Cushing, 285–8), and the opinion of Chief Justice Shaw does not militate at all against the position taken by counsel in that cause, for the learned Chief Justice Shaw does not contend that Congress by that act was doing more than fulfilling its obligation arising under that clause in the Constitution which required the return of fugitives from service or fugitive slaves. It was not, therefore, incumbent upon Congress to carry out that obligation through its judiciary, nor to establish a court of the United States before which questions arising under the fugitive slave law should be tried;

but, the power to return escaped slaves being granted to the United States by the Constitution, the forms or means by which this power was to be exercised was in the discretion of Congress, and, in the exercise of that discretion, any means might be employed, the judicial power of the United States need not be invoked at all, nor was it a conferring of judicial power on the commissioner.

A commissioner is not a court of the United States, but merely a judicial officer who has the power of a committing magistrate to examine the question of probable cause. He does not exercise the functions of a court, for the duty of the magistrate is exhausted when he hears one side of the case.

Wharton Cr. Pl., Pr. and Proc., sec. 71.

He hears only the testimony of such witnesses as is adduced before him, and, like courts-martial, has not the power of compelling the attendance of a witness or of punishing him if he fails to appear, or fails to testify if he does appear. He has no power to punish for contempt. (See *Ex parte* Perkins, 29 Fed. Rep. 900.)

The power to compel the attendance of a witness before a United States commissioner engaged in a preliminary hearing is nowhere expressly granted in any section of the Revised Statutes, and, if not necessarily incidental, the commissioners have no such power.

If, then, he has no such power, it follows, as a matter of course, that section 5406 could not have any possible application to preliminary hearings.

The commissioner acts rather as part of the executive and determines a matter of executive or administrative discretion, whether or not it is the duty of the executive to hold the prisoner for the action of the judiciary, and

the witnesses are more in the nature of informers than witnesses.

Congress frequently confers judicial functions upon executive officers or commissioners, and entrusts them with the decision of questions involving vast interests, as under the land laws, commissioners of Alabama Claims, Interstate Commerce Commission, the Bowman Act (March 3, 1883), etc., and as illustrated in the cases in 13 Howard, 40; 17 Howard, 525; 21 Howard, 506; but none of these tribunals or so-called tribunals are courts of the United States, nor would a prosecution lie against a person for intimidating a witness from testifying before them, under sec. 5406, R. S.

That a commissioner is not an officer of or part of the circuit court was held in *Ex parte* Van Orden (3 Blatchford, C. C. 166), where it was sought to certiorari the proceedings of a commissioner of the circuit court in New Jersey. Judge Betts, in refusing the application, says:

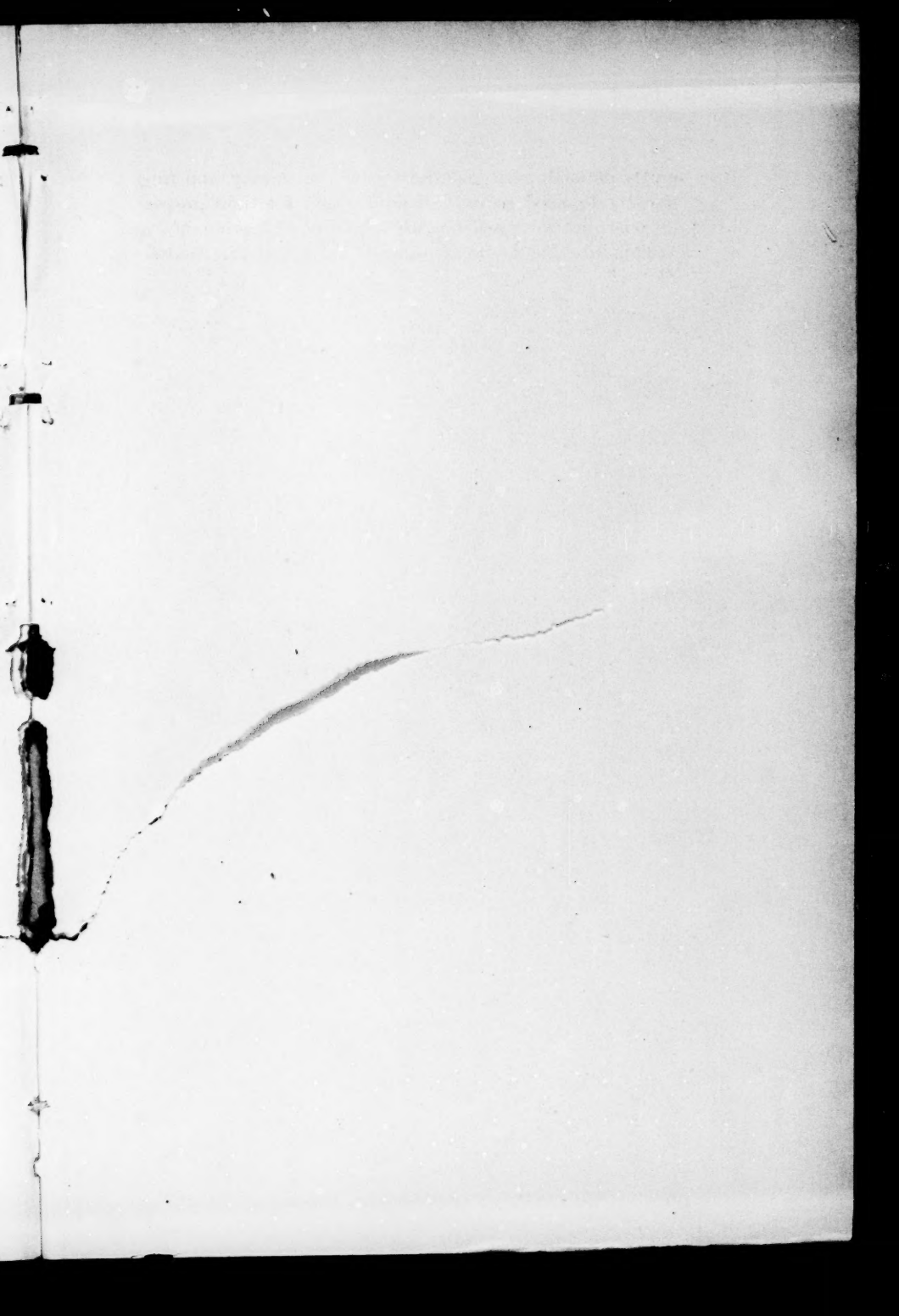
"A commissioner, in the execution of the duties of his office, under the act of September, 1850, is, in no legal sense, a magistrate inferior to the circuit court. No provision is made in that act or any other subjecting his proceedings to the control or review of this court. Nor are his functions declared to be subordinate to the authority of any tribunal. The court, in making the appointment of commissioners fulfils an agency imposed on it by Congress, and no more acquires thereby a supervision over him or his proceedings in his office than the President or Senate has over judges appointed by them. He is not even an officer of the court."

He is subject to removal by the circuit court which appointed him. (*In re* Eaves, 30 Fed. Rep. 21.)

We conclude, therefore, that a commissioner of the circuit court is simply a person who exercises functions

partly judicial, partly administrative, which may, and frequently do, need judicial discrimination for their proper exercise, but we insist that when holding this preliminary examination he is in no sense "a court of the United States."

JOHN C. FAY,
Attorney for Plaintiffs in Error.



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CASE No. [illegible]

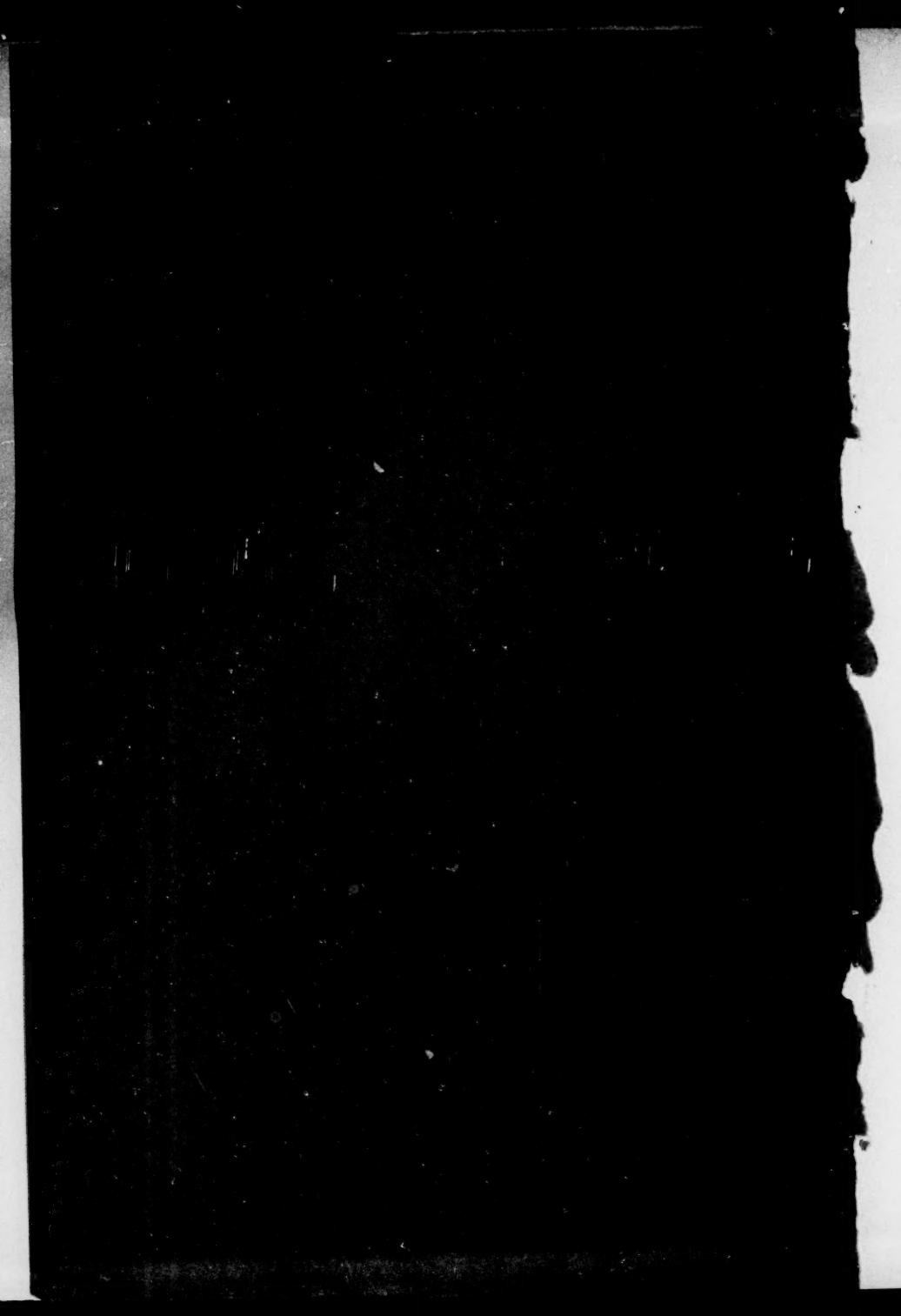
In the Supreme Court [illegible]

October Term [illegible]

J. W. Todd et al., plaintiffs in error,
v.
The United States.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF [illegible].

BRIEF FOR DEFENDANT IN [illegible]



In the Supreme Court of the United States.

OCTOBER TERM, 1894.

J. W. TODD ET AL., PLAINTIFFS IN error,
v.
THE UNITED STATES.
No. 822.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiffs in error in this case were indicted under § 5406 of the Revised Statutes, which makes the following offense criminal:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness *in any court of the United States* from attending such court or from testifying to any matter pending therein freely, fully, and truthfully, *or to injure* such party *or witness* in his person or property, *on account of his having so attended or testified*, * * * each of such persons shall be pun-

ished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.

Defendants were indicted as follows:

That heretofore, etc., J. W. Todd, alias Watson Todd, George W. Kelley [etc., naming plaintiffs in error and others], whose Christian names and surnames, respectively, are to this grand jury otherwise unknown, unlawfully, corruptly, forcibly, and feloniously did combine, conspire, and confederate together by force, intimidation, and threats. to injure Wiley Pruett and William Pruett, who had theretofore been witnesses, and testified against Joe Arnold, Milton Farmer, and George Kelley upon a charge of endeavoring to influence, intimidate, and impede witnesses in a court of the United States, in violation of the criminal laws of the United States, tried preliminarily by and before Robert Charlson, acting as a commissioner of the circuit court of the United States for said district, in their person and property *on account of the said witnesses above named having testified in said cause in the said court as aforesaid*. And in pursuance of said conspiracy, and to effect the object thereof, the said defendants, and each of them, did assault, beat, bruise, and wound with weapons the said Wiley Pruett and William Pruett, contrary, etc. (p. 1).

A demurrer to the indictment having been overruled, and a *nolle prosequi* having been entered as to certain persons indicted, the remainder were tried and convicted July 27, 1893. A motion in arrest of judgment having been overruled, they were each sentenced to imprisonment at hard labor for four years and payment of $500 and costs.

STATEMENT OF FACTS.

It does not seem to have been disputed that the Pruetts were outraged by some persons in the manner described in the indictment. The question mainly litigated was whether that outrage was committed for the reasons stated in the indictment. The facts as they appeared in the evidence are tersely stated at pp. 8–11 of the Record.

The Pruetts were witnesses duly subpœnaed on behalf of the United States before Robert Charlson, a United States circuit court commissioner, for the northern district of Alabama, as witnesses against Messrs. Arnold, Farmer, and Kelley, who were charged with endeavoring to influence, intimidate, and impede witnesses in a court of the United States. The Pruetts attended and testified against the accused persons.

Between 12 and 1 o'clock at night, on March 4, 1893, a crowd of armed men wearing masks broke open the houses of the two Pruetts, dragged them from their beds, and took them outdoors, bareheaded and barefooted, in their night clothes. The ground was frozen and the night very cold. "Wylie Pruett was then required to take off his pants and they were whipped by this mob with large sticks * * * until they were bloody from their shoulders to their knees, their backs being lacerated in many places, the skin on their backs being cut in gashes six to eight inches long." William was similarly served. They received about 75 strokes apiece, most of the maskers (who were about 20 in number) being required to strike them three blows each. They were then marched back in the same manner to their houses, the crowd firing pistols into the ground near their bare feet.

The Government testimony tended to show that this outrage was committed on account of the testimony given by the Pruetts before Commissioner Charlson. The testimony on behalf of defendants tended to show that the Pruetts were men of bad character, who had been guilty of some offences in the neighborhood, such as killing stock, and that they had made some threats against defendant Todd a short while prior to the whipping, and in particular that William Pruett "had threatened to dynamite the schoolhouse, and if Todd was not killed by the dynamite he would shoot him as he ran out." The offenses referred to, however, had occurred many years before. "Testimony of defendants further tended to show that they were not guilty of the whipping * * * and that if they were, it was for other misbehavior in this neighborhood in the way of killing stock and making threats, as above mentioned; and the tendency of the defendants' evidence was to prove an *alibi*."

The Government in reply introduced testimony tending to show that the Pruetts were men of good character and had not been guilty of killing stock and had not made threats against Todd.

ARGUMENT.

We shall follow in the argument the arrangement adopted by plaintiffs in error in their brief.

I.

Form and sufficiency of indictment.

(*a*) Defendants object that the indictment does not state that they *knew* that the Pruetts had testified, &c., and rely on the case of *Pettibone* v. *United States* (148

U. S., 197). The indictment in that case was found under § 5399 and § 5440 of the Revised Statutes, making criminal an endeavor to "influence, intimidate, or impede any witness or officer in any court of the United States in the discharge of his duty," or by corruption, threats, or force, to obstruct or impede the due administration of justice therein; or to conspire to commit any offense against the United States, or defraud the United States. The indictment was very long, but failed to aver sufficient facts to bring the conspiracy within the statute. "The pleader carefully avoided the direct averment that the purpose of the confederation was the interruption of the course of justice in the United States court" (p. 204). The indictment was held insufficient (two justices dissenting) because *scienter* was not alleged, the court saying, by Mr. Chief Justice Fuller, that the indictment "must charge knowledge or notice, or set out facts that show knowledge or notice on the part of the accused."

It is scarcely necessary to refer to § 1025 of the Revised Statutes as providing that after the verdict (and no specific objection was taken before the verdict) all formal errors in the indictment, if there are any, are cured. (*Dunbar* v. *United States*, 156 U. S., 185.)

It is difficult, however, to perceive what defect is found in this indictment. It sets forth distinctly that the outrage was committed "on account of the said defendants above named having testified in said cause in the said court as aforesaid." This allegation that the purpose of the outrage was to punish witnesses for testifying necessarily involved knowledge on the part of the outragers that they did so testify.

(*b*) The next defect charged (which also was not specified in the demurrer) is that the testimony of the Pruetts is not alleged to have been given "freely, fully, and truthfully" before the United States commissioner. In other words, defendants' construction of the statute is that if the testimony of the witnesses in a United States court fails in either of the three elements of freeness, fullness, or truthfulness, they can be injured to any extent in person or property without power of redress from the Federal tribunals.

If this construction of the law is correct, it is necessary upon the trial of a case like the present one, first to try over again the case in which the victims of the assault appeared as witnesses, in order to ascertain whether they had omitted anything known to them in their testimony, and whether their testimony was true. It is also necessary to investigate as to whether their testimony was freely given, or whether it was forced from them. It is respectfully submitted that the construction so given to the statute is a strained one. Even a criminal statute is to be construed with some reference to common sense. (*United States* v. *Lacher*, 134 U. S., 624.) A reasonable construction of the statute would be to refer the word "so" in the phrase "so attended or testified" to the words "such court" and "to any matter pending therein," in the clause "from attending such court or from testifying to any matter pending therein." It can not have been the object of the statute to enable persons committing such outrages to escape by retrying the issues upon which the outraged witnesses testified. It is, on the other

hand, one plain object of the statute to prevent such prior intimidation as would impair in freedom, fullness, and truthfulness the testimony of any witness in the Federal court. The three adverbs under consideration should, therefore, we submit, be confined in their operation to the word "testifying" in the first part of § 5406, and not construed to qualify the word "testified" in the following portion of the section.

(*c*) The next alleged defect (also not noticed in the demurrer) is that Charlson is only alleged to have been "acting as a commissioner," from which it is inferred that he may have been a commissioner *de facto* and not *de jure*, and hence that all protection is withdrawn from witnesses who appear before him. Upon this objection it may be sufficient to remark that it is one of form only, and that Charlson is presumed to have been a *de jure* commissioner (*Ingraham* v. *United States*, 155 U. S., 434, 438), as, indeed, is stated in the bill of exceptions to have been the fact.

The other formal objections to the indictment seem to be abandoned.

II.

Impanelling of the jurors.

(*a*) Defendants were restricted to three peremptory challenges. They claim that they should have been allowed ten.

This raises the question whether an infamous crime is necessarily a felony, a question which is settled by *Bannon*

It will be noticed that this instruction is not a criticism upon defendants for not appearing on the stand themselves.

The principle here laid down by the court is one long established; it is, indeed, a general principle, not confined to any one defense.

In *State* v. *Grebe* (17 Kansas, 458) the court charged that—

> Where evidence, which would rebut or explain certain facts and circumstances of a grave and suspicious nature, is peculiarly within the defendant's knowledge and reach, and he nakes no effort to procure that testimony, the jury may very properly take such fact into consideration in determining the prisoner's guilt or innocence, but no inference of guilt is to be drawn from the omission of the defendant and his wife to testify.

The Supreme Court, speaking by Mr. Justice Brewer, affirmed the conviction. (See also to the same effect *People* v. *Grimshaw*, 33 Hun., 505, 510, and cases cited; *People* v. *Hovey*, 92 N. Y., 554, 559, 560; *Commonwealth* v. *Costley*, 118 Mass., 1, 27, and cases cited by Gray, C. J.; 2 Thompson on Trials, §§ 2452–53, and cases cited.)

(*b*) This assignment of error relates to the following charge (p. 21):

> It is here insisted on the part of the defence that even if the jury believe from the evidence that the defendants were of the band of men who assaulted the Pruetts on the night of the 4th of March last, that will not justify a verdict of guilty against them unless the jury further finds that the cause and motive for the assault and whipping was that charged in the

> indictment. This is correct, but it is not questioned that this assault and whipping of the Pruetts on the night of the 4th of March last was lawless and wicked conduct, without justification or excuse under any law, human or divine, and the character of this conduct is fair matter for the consideration of the jury in connection with the proof relied on to show that the whipping was in whole or in part for the specific cause charged in the indictment.

Counsel for plaintiffs in error construes this as making "the whipping itself a circumstance to be considered by the jury as tending to show why it was done." The last sentence is certainly awkward in expression. It will be noticed that this extract from the charge has one punctuation at p. 21 and another at p. 40 of the Record. It is a paragraph which might convey different meanings according to the elocution employed in its delivery. If a pause, corresponding to a comma, were, for instance, made after the words "consideration of the jury," and no such pause after the words "proof relied on," the meaning would be different from that given it by counsel.

There are two or three distinct propositions contained in this passage, and the duty of counsel in such case is to make his exception specific. This rule, indeed, has not been enforced by the court in capital cases, but in other cases it is submitted that it is a rule necessary for the protection of the trial court and to prevent needless delays. If the attention of the trial court had been called to the fact that the last portion of this passage was so worded as to bear possible construction which would render it erroneous, it is presumable that he would have altered it at once. Such alterations in language in response to specific

exceptions are matters of daily occurrence on the trial of causes. The first sentence as printed at p. 21, taken in connection with the words "this is correct," is clear in meaning and favorable to the defendants. It does not, indeed, contain the element of "no reasonable doubt," but it is not necessary that this should be repeated in every sentence of the charge, and from the other fragments here contained, it is evident that the jury were charged upon that point.

In the recent criminal case of *Allis* v. *United States* (155 U. S., 117, 122) the court lays down the following rule:

> A party must make every reasonable effort to secure from the trial court correct rulings, or such, at least, as are satisfactory to him, before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions.

(See *Phœnix Life Insurance Co.* v. *Raddin*, 120 U. S., 183; see also *First Unitarian Society* v. *Faulkner*, 91 U. S., 415, 423; *Railroad Company* v. *Varnell*, 98 U. S., 479, 482; *Mobile, &c., Railway* v. *Jurey*, 111 U. S., 584, 496; *Bogk* v. *Gassert*, 149 U. S., 17, 26; *Harvey* v. *Tyler*, 2 Wall., 328, 339; *Indianapolis R. R.* v. *Horst*, 93 U. S., 291, 295; *United States* v. *Hough*, 103 U. S., 71; *Moulor* v. *American Life Ins. Co.*, 111 U. S., 335, 337, 338.)

In *Carver* v. *Astor* (4 Pet., 1, 81) Mr. Justice Story said:

> If, indeed, in the summing up the court should misstate the law, that would justly furnish a ground

> for an exception. But the exception should be strictly confined to that misstatement, and by being made known at the moment would often enable the court to correct an erroneous expression, or to explain or qualify it in such a manner as to make it wholly unexceptionable or perfectly distinct.

(c) This assignment of error relates to the proposition of the court that if the outrage was committed for mixed motives, nevertheless it is sufficient "if you find it was any part of the purpose and motive of the conspirators to assault and whip the Pruetts on account of their having testified in the case of the United States against Kelley," etc.

The statute makes a jurisdictional requirement that the outrage must have been committed "on account of his having so attended or testified." It contains no such word as "solely." It must, therefore, be sufficient, if that was *a* cause, even though other elements of unpopularity may have played their part. Otherwise, in every case like this, it would be sufficient to obtain acquittal for the accused to say: "I did indeed abuse the man principally because he testified in a Federal court; but I also thought he was a mean cuss anyhow, and if I had not thought so, would not have touched him." In fact, such outrages are not likely to be committed upon popular persons; and, therefore, probably in every case which the statute was framed to reach, the unpopularity of the victim is really a part of the cause of the outrage. Statutes should receive a reasonable construction. (*Lau Ow Bew* v. *United States*, 144 U. S., 47, 59, and cas. cit.)

The instructions in this respect follow the charge of Judge Speer in *United States* v. *Lancaster* (44 Fed. Rep., 896, 903).

(*d*) This assignment of error relates to the following paragraph of the charge:

> If there was *probable* cause to believe these defendants had violated the laws of the United States and were proceeded against under the forms of the law, then there is no cause for complaint, and no complaint will be heard that they are brought to trial here in this court and not in the State courts of Cherokee County (p. 22).

If this is to be construed as a direction to the jury that they must convict if *they* have merely "probable cause to believe" the defendants guilty, it is, of course, error. But this was not the meaning of the court, for that the court required an absolute finding by the jury is evident from the other fragments of the charge, no part of which appears in the record except as it happens to be excepted to. The passage here under consideration is evidently taken from some discussion concerning criticisms made upon the district attorney. The "probable cause" is assigned as justification for the fact that defendants are "brought to trial here in this court."

It is a familiar rule that the charge is to be considered as a whole (2 Thompson on Trials, § 2407), and while we do not have it before us as a whole, nevertheless there is sufficient in the portions excepted to as *b*, *c*, and *e* to show that the jury were not given to understand that their verdict was to be based upon "probable cause."

(*e*) Defendants' construction of this paragraph is very much strained. If "the defendants were parties to and participated in the whipping," and if the whipping was committed "by a band of disguised men who had conspired and agreed to do it and actually carried it out," and this was done as charged, on account of the fact that the victims had testified as stated in the indictment, then evidently the defendants participated in the guilty intent.

(*f–v*) We do not consider at length the requests to charge which were refused by the court, because the court's charge is not set forth in full, nor does the bill of exceptions state what the court actually charged upon the matters alluded to in the requests. Probably in every thoroughly tried case many requests are refused, although the propositions therein contained are entirely correct, because they had been in effect already charged. If this were not proper, parties could force the court to give undue weight to certain parts of the case by multiplying requests to charge thereon. The law is therefore well settled, that it is sufficient if "the substance of the instructions refused was contained in the charge subsequently given by the court." (*Anthony* v. *Louisville and Nashville R. R. Co.*, 132 U. S., 172; *Tucker* v. *United States*, 151 U. S., 164, 170.) Hence the following proposition:

> That the law was fully given by the court to the jury we are bound to presume in the absence from the record of the entire charge, and that it was correctly stated from the fact that plaintiffs in error took no exceptions to it. True, the record contains four special instructions given by the court, * * * but nowhere is it stated that these four instructions were

all that were given. * * * [The instructions refused] may have been refused because already fully given in the general charge. (*Reagan* v. *Aiken*, 138 U. S., 109, 113–14.)

IV.

Rulings upon evidence.

(*a*) It is claimed that certain statements of Todd, Roberts, and Mitchell were not part of the *res gestæ* and were not evidence against the other defendants. These statements were made "just as the crowd was leaving the house of the said William Pruett." The three men named "came and sat down on a rock" until others of the party who were a little behind them came up "and reached them in a minute or two, when these three men got up and went off with them and there were altogether 15 or 16 men." The remarks which tended to show that the purpose of the outrage was as stated in the indictment were made "while these three men were sitting on the rock and before the others came up." The defendants moved that the testimony as to these statements should be limited to the three men present when they were made. This motion the court overruled and the other defendants excepted (p. 12).

It is, of course, undisputed that upon a trial for conspiracy statements of conspirators tending to show the motive are not admissible except as against themselves, if made after the object of the conspiracy is accomplished. (*Logan* v. *United States*, 144 U. S., 264; *Brown* v. *United States*, 150 U. S., 93, 98; *Sparf* v. *United States*, 156

U.S., 51.) The remarks held incompetent in the Brown case were made the following morning, and those held incompetent in the Sparf case were apparently also made after a considerable interval of time. The remarks here in question were made almost momentarily after the outrage was completed, and before the party had finally separated, although the persons making the remarks were for the moment apart from the rest. Statements made at such a time would be regarded as part of the *res gestæ* by some authorities and text writers; and statements of a man fatally injured made soon after the injury would by them be considered admissible even without showing consciousness of imminent death on the part of the narrator. (See Wharton Crim. Ev., §§ 263, 296, 691, 699, and cases cited; Abbott's Trial Brief, Criminal Causes, pp. 379–83.)

If the remarks are *res gestæ*, their admission was largely within the discretion of the trial court. (*Alexander* v. *United States*, 138 U. S., at pp. 356–7.) But this court, in *Vicksburg, &c., R. R. Co.* v. *O'Brien* (119 U. S., 99), four justices dissenting, held remarks of a railroad engineer ten minutes after the railroad accident not to be part of the *res gestæ*. To the contrary, apparently, is *Commonwealth* v. *M'Pike* (3 Cush., 181), approved in *Insurance Co.* v. *Mosley* (8 Wall., 397, 406); also *State* v. *Horan* (32 Minn., 394), *Elkins* v. *McKean* (79 Pa. St., 493, 501), *Hermes* v. *Ry. Co.* (80 Wis., 590), *Reed* v. *City of Madison* (85 Wis., 667), *Missouri Pacific Ry. Co.* v. *Baier* (37 Neb., 235). In *Waldele* v. *R. R. Co.* (95 N. Y., 274), the authorities are reviewed and thirty minutes held too long. The question may depend to some extent upon the

nature of the remark. Thus, a remark in the nature of an excuse or explanation may be incompetent at a time when a chuckle like that here under consideration is entitled to considerable weight (*Hewitt* v. *Eisenbart*, 36 Neb., 794). In *Logan* v. *United States*, *supra*, some of the remarks stated in the opinion to be incompetent were made while returning from the scene of action, but after the dispersion of the mob (pp. 275, 309). There were similar remarks in the record in that case made at a later period, and affording ample ground for reversing the judgment (pp. 274–5). Perhaps the present question is to be regarded as a close one, and not yet entirely settled. If this exception is held fatal, it remains to consider whether the conviction is to stand as to the defendants who participated in this conversation.

(*b*) The court's interjection of this comment here may have been inadvisable; but it was a comment to which no exception would have lain if incorporated in the instructions to the jury, and hence no question *of law* is raised by the mere fact of its appearing at this place in the record, although such remarks may be considered by appellate courts having general power to grant new trials independently of errors of law. (*Daly* v. *Byrne*, 77 N. Y., 182, 190–1.) Plaintiffs in error find no authority for considering such a remark upon a bill of exceptions, and we believe that there is none to be found.

(*c*) This remark was entirely harmless; moreover, it was part of the *res gestæ*. Witnesses in giving a full account of such an occurrence always throw in a good deal that is strictly irrelevant. The trial can not be stopped

to sift out purely harmless irrelevancies. Such questions are largely for the discretion of the trial court. (*Moore* v. *United States*, 150 U. S., 57.)

(*d*) It is unnecessary to consider this assignment, as it is not based on an exception.

(*e*) Marion Copeland was one of the witnesses for the prosecution. One of the defences was a claim that the Pruetts, the victims of the outrage, had a reputation for thievishness. On his cross-examination Copeland was asked: "Didn't you know they were accused of stealing, too?" Defendants excepted to the exclusion of this question.

The question was objected to on various grounds. Defendants were attempting to prove their own case by cross-examination of plaintiffs' witnesses, which is contrary to rules of trial practice as recognized in the Federal courts. (*Wills* v. *Russell*, 100 U. S., 621, 626.)

Moreover, it is improper to ask a witness whether other witnesses have been *accused* of crime. Even an indictment is not admissible (*Campbell* v. *State*, 23 Ala., 44, 81; *Van Bokkelen* v. *Berdell*, 130 N. Y., 141, 145; 1 Wharton on Evidence, § 567; 2 Elliott's General Practice, § 673, note; 1 Thompson on Trials, § 535); and a conviction, although admissible in impeachment, must be proved by the record.

(*f*) Marion Copeland was allowed to testify that on a certain trip to Birmingham he ostensibly came at the instance of the defendants to see their attorney, and let them believe that that was his business there, when in fact he came to see the United States officials to get protection.

After this evidence was all brought out (being in explanation of circumstances previously detailed by defendants' witnesses in the impeachment of Copeland's testimony), the district attorney went over the ground again with Copeland by new questions growing out of a refutation of the testimony. They seem to have been proper upon the issue concerning Copeland's position in the case; but it is unnecessary to consider the exceptions, because, as the testimony was already in, by the same witness, the questions can not have done any harm. Defendants should have moved to strike out, or moved for an instruction, to make their objection available.

To meet testimony to the effect that Marion Copeland had been offered $200 to turn State's evidence (which he flatly denied), he was asked whether "he ever made known to anyone his desire to surrender when he was at large, and enter a plea of guilty for this action." This question he was allowed to answer under exception, and he answered by saying that he had so informed his father and one of his fellow-conspirators. He was further allowed to testify that his father offered him no inducement to come and plead guilty. All of this was competent for the reasons stated under "*h*," *infra*.

After the issue of his alleged bribe to turn State's evidence had been raised, it is unnecessary to defend the action of the court in allowing him to state that he did so because he knew they were innocent men indicted and under arrest.

(*g*) This assignment of error relates to the refusal of the court to allow the introduction of an affidavit of

William Pruett. It appears that Pruett was shown a certain affidavit made by himself before Commissioner Charlson, which tended to contradict his testimony, and was asked whether he had sworn to it. He admitted that he signed the affidavit, but denied that he swore to it (p. 13). Defendants afterwards offered the paper in evidence, without further proof (p. 21). It was incompetent as an affidavit, without proving that Pruett did swear to it. Its exclusion was therefore proper. Defendants already had the benefit of Pruett's admission that he had signed these written statements, and that was all that they were entitled to without calling Charlson or somebody else to contradict Pruett as to the swearing.

(*h*) Defendants introduced evidence tending to show that Marion Copeland "had been induced by promises of pecuniary reward, *after he had been arrested*, to admit his guilt." To meet this evidence the Government called his father, Leander Copeland, who testified that Marion came to him *before he was arrested* in this case, and had a talk with him. Leander was then asked, "Did he or did he not admit his guilt in this matter?" This question was admitted, and was answered in the affirmative. Leander was then allowed to give the conversation and name the persons stated by Marion to have been present with him, including the names of some of these defendants. On objection, the district attorney stated "that it was not offered as evidence against these defendants * * * but only went to the credibility of witness, it having been attempted to be shown by the defendants that said witness had been induced by promise of reward

to make a confession," etc., and that the evidence was offered "for the purpose of showing what the witness *first* said when not under the influence of the defendants and before any reward could possibly have been offered him on the subject, and was only intended to go to his credibility." The objection was overruled.

In his answer to the question, however, it does not appear that Leander gave the names of any of the defendants on trial. He stated merely "that the said Marion Copeland told him that certain ones who had been indicted were innocent, namely, the defendants that the said witness in his statement on the stand said were innocent, and whose cases had been nol-prossed by the Government, and that his purpose was to come home and surrender himself to the authorities and take the consequences; that he did not want these innocent defendants (whose cases had been nol-prossed) to be punished for a crime that they were not guilty of" (pp. 18, 19).

This evidence was admissible under the authorities upon the principle that when a witness is attempted to be impeached by proof of bias or pecuniary interest, it is competent to rebut the proof by introducing his statements made before the bias or pecuniary interest existed. This case is not to be confounded with the case of a witness who is impeached merely by proving his own contradictory statements. Some courts have held that when a witness is impeached in this way he may be supported by proof of statements made by him which were consonant with his testimony. The great weight of authority, however, is to the contrary, for such evidence does not prove

that the witness is credible, while it leads the trial into a merely collateral question, as to which time he lied.

The rule now seems to be well settled, however, where the impeachment is by proof of bias or pecuniary interest, or anything of that sort; the evidence being admitted only for the purpose of showing that a statement of the witness "is not a fabrication of recent date." (*Hester* v. *Commonwealth*, 85 Pa. St., 139, 157–8.) The rule is laid down by Mr. Phillipps, and approved by Mr. Roscoe, that "where the counsel on the other side impute a design to misrepresent from some motive of interest or friendship, it may, in order to repel such a motive, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist." (1 Roscoe Crim. Ev., 106.)

Wharton states the rule as follows:

> Where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence should be rebutted. (See also Wharton Crim. Ev., § 492; 1 Wharton on Evidence, § 570; 1 Greenleaf on Evidence, § 469; 3 Russell on Crimes, 593; Rapalje on Witnesses, § 224; 2 Elliott's General Practice, § 680; *Commonwealth* v. *Jenkins*, 10 Gray, 485, 489; *Hewitt* v. *Corey*, 150 Mass., 445; *Stolp* v. *Blair*, 68 Ill., 541, 544; *People* v. *Doyell*, 48 Cal., 85, 91.)

(*j*) This heading includes four assignments of error relating to affidavits of the defendants, Beck, Roberts, Sims, and Stimpson.

To the introduction of all these affidavits "the defendants" objected and excepted. The objection to the last three was a single one. They were not objected to separately.

Each of these affidavits, however, had reference only to the defense of the affiant. It contained nothing bearing upon the question whether an outrage was committed, or who (outside the affiant) was present at the outrage, or what its purpose was. It bore only on the affiant's own defense of *alibi*.

If, therefore, the admission of either affidavit was error, it was error which prejudiced the affiant alone; and it was, therefore, an error of which the other defendants can not avail themselves. It is unavailable to them upon principles analogous to that just applied by this court in *Dunbar* v. *United States* (156 U. S., 185), which is thus stated in the syllabus: "An objection to the admissibility of testimony as to a count upon which the accused is acquitted is immaterial."

It is therefore unnecessary to consider whether in a case like this an objection should be held available as to certain defendants, when the objection and exception were taken by all the defendants jointly, and were unavailable as to one or more of them. This court has just held such an objection tenable in *Sparf* v. *United States* (156 U. S., 51, 56–8). That case was a capital one, and the rules of evidence seem to be less strict in capital cases in Federal courts. The ruling is a novel one and is opposed to the authorities in New York (*Black* v. *Foster*, 28 Barb., 387; *Stowell* v. *Hazelett*, 66 N. Y., 635; compare *Murray* v.

Usher, 117 N. Y., 542); in Illinois (*Consolidated Ice Machine Co.* v. *Keifer*, 134 Ill., 481, 494); and in Indiana (*Keesling* v. *Doyle*, 8 Ind. App., 43); which latter are approved in 2 Elliott's General Practice, § 586. A similar rule applies to joint demurrers and joint motions. (2 Thompson on Trials, § 2721.) It is based on the same principle as the rule requiring specific exceptions to the charge ——— that no traps should be laid for the court, and that new trials should not be granted for mere inadvertences, which would probably have been corrected had attention been called to them.

It now remains to consider the admissibility of the four affidavits as against the respective affiants.

The first affidavit is that of D. M. Beck. Beck had introduced as a witness on his behalf one Kitsinger, who undertook to prove an *alibi* by swearing that he and Beck spent the night of March 4, 1893, in a certain house, and that one Tom Strawn was not at the house that night, and did not sleep with Beck on that night. The district attorney then offered Beck's affidavit made in support of a motion in this case, in which he stated that he expected to prove by Strawn that he and Strawn slept together on said night of March 4. The general principle governing the admissibility of admissions is that they are competent when "self-disserving," that is, when offered by the adversary and relevant to any issue being tried. Stephen states the rule as follows: "An admission is a statement, oral or written, suggesting any inference as to any fact in issue, or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to the proceeding.

Every admission is (subject to the rules hereinafter stated) deemed to be a relevant fact as against the person by or on whose behalf it is made," &c. (Steph. Ev., art. 15.) By introducing Kitsinger he opened the door to any testimony tending to contradict the testimony so introduced. In other words, he made the question whether Strawn was with him, if Kitsinger was, a relevant question in the case. This affidavit, therefore, seems proper in rebuttal as against affiant for the purpose of meeting the testimony of Kitsinger.

The affidavit of Henry Roberts, made under similar circumstances, was to the effect that one John Tippins spent the night of March 4 with him. Tippins had testified on behalf of the Government that he "did not stay with Roberts that night, and did not sleep with him, and was not there on that night, and that the said Henry Roberts had tried to get the said John Tippins to testify that he did stay and sleep with him that night, but that the said Tippins declined to do so" (p. 20). It is proper in support of a prosecution for crime to prove that the defendant had made corrupt attempts to fabricate testimony in his favor. (*People* v. *Marion*, 29 Mich., 31, 39; *Chicago City Ry. Co.* v. *McMahon*, 103 Ill., 485; 2 Wharton on Evidence, § 1265; *State* v. *Williams*, 27 Vt., 724; *State* v. *Staples*, 47 N. H., 113, 119; *Cover* v. *Commonwealth*, 20 W. N. C., 386.) This depends on the same principles as proof that the witness lied when accused. (*People* v. *Conroy*, 97 N. Y., 62, 80; *People* v. *Arnold*, 43 Mich., 303; *Walker* v. *State*, 49 Ala., 398.) In *Albritton* v. *State* (94 Ala., 76), cited by plaintiffs in error, the court says:

"Of course a fraudulent attempt to prove a simulated *alibi*, sustained by perjury, will, when detected, be a circumstance of great weight against the prisoner."

Tippins's testimony was therefore competent, and, indeed, it was not objected to. Roberts's affidavit was therefore competent as supporting Tippins's testimony.

The affidavit of the defendant Sam Sims is not so defensible. If its admission was error and the objection sufficient, it would follow that there must be a new trial as to Sims.

The affidavit of Stimpson is admissible for the same reason as that of Roberts.

(*k*) The 90th assignment of error (p. 36) does not relate to anything in the bill of exceptions. The 102nd assignment of error relates to the following question asked by defendant of the witness George McGee and excluded on objection by the district attorney:

> What was the reputation of these men (meaning the defendants) in that community, as being temperance men—temperate and opposed to making or selling liquor? (p. 18).

The counsel for plaintiff in error states that this evidence was relevant "to exculpate them from any hostile feeling towards the prosecuting witnesses that existed in the community against them by reason of said prosecuting witnesses having reported illicit distilleries, evidence of which was admitted on the part of the prosecution * * * in the case charged in the indictment * * * growing out of the said illicit distilleries." (Brief, p. 10.) We do not find any passage in the bill of exceptions upon which this statement can be based.

Temperance, and opinions on the temperance question, are not matters provable by general reputation. They were not charged with intemperance or with "moonshining."

It is therefore respectfully submitted that the judgment should be affirmed, at least except as to the defendant Sam Sims, unless the statements of defendants Todd, Roberts, and Mitchell be held inadmissible as against their co-defendants, in which case the judgment should be affirmed as to them and reversed as to the co-defendants.

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